No. 74-1270

In the Supreme Court of the United States

OCTOBER TERM, 1974

RUSSELL TRAIN, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS

v.

COLORADO PUBLIC INTEREST RESEARCH GROUP, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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v.

COLORADO PUBLIC INTEREST RESEARCH GROUP, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the Environmental Protection Agency and its Administrator,[1] petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. B) is reported at 507 F. 2d 743. The opinion of the district court (App. C) is reported at 373 F. Supp. 991.

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[1] The Nuclear Regulatory Commission and the Energy Research and Development Administration concur in the views expressed herein.

JURISDICTION

The judgment of the court of appeals was entered December 9, 1974 (App. A). On March 4, 1975, Mr. Justice White extended the time within which to petition for a writ of certiorari to and including April 8, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

REGULATIONS AND STATUTES INVOLVED

Sections 125.1(y) and 125.2(a)(1) of Title 40, Code of Federal Regulations, read in part as follows:

§ 125.1 *Definitions.*

* * * *

(y) The term "pollutant" means * * * radioactive materials * * * discharged into water. * * *

COMMENT.—The legislative history of the [Federal Water Pollution Control] Act [Amendments of 1972] reflects that the term "radioactive materials" as included within the definition of "pollutant" in section 502 of the Act [33 U.S.C. (Supp. III) 1362] covers only radioactive materials which are not encompassed in the definition of source, byproduct, or special nuclear materials as defined by [Section 11e, s, t (redesignated z, aa) of] the Atomic Energy Act of 1954, as amended [42 U.S.C. 2014(e), (z), (aa)], and regulated pursuant to the latter Act. Examples of radioactive materials not covered by the Atomic Energy Act and, therefore, included within the term "pollutant" are radium and accelerator produced isotopes. (H.R. Rep. 92-911, 92d Cong. 2d Sess., 131, March 11, 1972; 117 Cong. Rec. 17401, daily ed., November 2, 1971; 118 Cong. Rec. 9115, daily ed., October 4, 1972.)

* * * *

§ 125.2 *Scope and purpose.*

(a)(1) The regulations in this part prescribe the policy and procedures to be followed in connection with applications for federally issued permits authorizing discharges into the navigable waters, the waters of the contiguous zone, and the oceans, during the periods that the Administrator of the Environmental Protection Agency is authorized to issue such permits pursuant to sections 402 and 405 of the Act [33 U.S.C. (Supp. III) 1342, 1345].

Subsections e, s and t (redesignated z and aa) of Section 11 of the Atomic Energy Act of 1954, 68 Stat. 923, 924, as amended, 42 U.S.C. 2014(e), (z), (aa), read as follows:

e. The term "byproduct material" means any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material.

* * * *

s. The term "source material" means (1) uranium, thorium, or any other material which is determined by the Commission pursuant to the provisions of section 61 [42 U.S.C. 2091] to be source material; or (2) ores containing one or more of the foregoing materials, in such concentration as the Commission may by regulation determine from time to time.

t. The term "special nuclear material" means (1) plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material which the Commission, pursuant to the provisions of section 51 [42 U.S.C. 2071], determines to be special nuclear material, but does not include source material; or (2) any material artificially enriched by any of the foregoing, but does not include source material.

Sections 402(a)(1), (b), and (c)(1), 502(6), and 511(a)(1) of the Federal Water Pollution Control Act, as added thereto by the Federal Water Pollution Control Act Amendments of 1972 (86 Stat. 880-882, 886, 893, 33 U.S.C. (Supp. III) 1342(a)(1), (b), and (c)(1), 1362(6) and 1371(a)(1) read in pertinent part as follows:

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

SEC. 402. (a)(1) Except as provided in sections 318 and 404 of this Act [33 U.S.C. (Supp. III) 1328, 1344], the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301 (a) [33 U.S.C. (Supp. III) 1311(a)], upon condition that such discharge will meet either all applicable requirements under sections 301, 302, 306, 307, 308, and 403 of this Act [33 U.S.C. (Supp. III) 1311, 1312, 1316, 1317, 1318, 1343], or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines

are necessary to carry out the provisions of this Act.

• • • •

(b) • • • the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. • • •

• • • •

(c)(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those navigable waters subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 304(h)(2) of this Act [33 U.S.C. (Supp. III) 1314(h)(2)]. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

• • • •

GENERAL DEFINITIONS

SEC. 502. Except as otherwise specifically provided, when used in this Act:

• • • •

(6) The term "pollutant" means * * * radioactive materials * * * discharged into water. * * *

* * * *

OTHER AFFECTED AUTHORITY

SEC. 511. (a) This Act shall not be construed as (1) limiting the authority or functions of any officer or agency of the United States under any other law or regulation not inconsistent with this Act; * * *.

QUESTION PRESENTED

Whether nuclear waste material, comprehensively regulated and controlled through licenses issued under the Atomic Energy Act by the successor agency to the Atomic Energy Commission, is a "pollutant" within the meaning of the Federal Water Pollution Control Act, which requires the Environmental Protection Agency to establish regulations and controls over pollutants by administering a detailed permit program.

STATEMENT

Prior to the decision below, the Atomic Energy Commission—now the Nuclear Regulatory Commission (NRC) and the Energy Research and Development Administration (ERDA)[2]—exercised exclusive authority in regulating radioactive effluents released

[2] NRC and ERDA succeeded to the powers of the Atomic Energy Commission on January 19, 1975, pursuant to the Energy Reorganization Act of 1974, 88 Stat. 1233-1254; see 40 Fed. Reg. 3242, 3520.

from NRC-licensed electrical power plants and from government research and production facilities operated by contractors for ERDA.

1. *The Atomic Energy Act.* The Atomic Energy Act of 1946 established a federal monopoly in the production and use of radioactive materials necessary to provide nuclear energy or created in the production of such energy. In 1954, Congress revised the Act to permit private parties to produce and utilize nuclear energy for peaceful purposes. But Congress conditioned private participation on compliance with a comprehensive and stringent federal licensing program designed to protect the common defense and the public health and safety. 42 U.S.C. 2011, *et seq.* Under this Act, the production, utilization and disposal of source,[3] special nuclear,[4] and by-product materials[5] may be accomplished only in accordance with licenses issued by the NRC.

[3] "The term 'source material' means (1) uranium, thorium, or any other material which is determined by the Commission pursuant to the provisions of section 2091 of this title to be source material; or (2) ores containing one or more of the foregoing materials, in such concentration as the Commission may by regulation determine from time to time." 42 U.S.C. 2014(z).

[4] "The term 'special nuclear material' means (1) plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material which the Commission, pursuant to the provisions of section 2071 of this title, determines to be special nuclear material, but does not include source material; or (2) any material artificially enriched by any of the foregoing, but does not include source material." 42 U.S.C. 2014(aa).

[5] "The term 'byproduct material' means any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process

Nuclear power plants, which produce, use, and dispose of these materials, may be constructed and operated only pursuant to detailed NRC licenses.[6] Extensive NRC regulations limit permissible radioactive discharges (10 C.F.R., Parts 20, 30, 40, 50 and 70), and licenses issued by the NRC not only require compliance with these limits, but also prescribe the manner in which radioactive wastes are to be discharged from the plants. See 42 U.S.C. 2133, 2134, 2201(b), 2201(i), 2233.

2. *The Federal Water Pollution Control Act.* The Federal Water Pollution Control Act Amendments of 1972 (86 Stat. 816-896, 33 U.S.C. (Supp. III) 1251-1376) (FWPCA) required the Administrator of the Environmental Protection Agency (EPA) to set up a permit program in order to regulate the discharge of pollutants into the Nation's waterways. 33 U.S.C. (Supp. III) 1342.[7] Under the FWPCA, such discharges are forbidden unless made in accordance with a permit, which must ensure that discharges comply with established limits on pollutants.

On May 22, 1973, the Administrator of the EPA adopted regulations prescribing the policy and procedures to be followed in the issuance of federal permits authorizing discharges into the Nation's waters.

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of producing or utilizing special nuclear material." 42 U.S.C. 2014(e).

[6] The licensing procedures are described in *Power Reactor Development Co.* v. *Electricians*, 367 U.S. 396, 403-409.

[7] The States may issue permits under programs approved by the EPA. 33 U.S.C. (Supp. III) 1342.

40 C.F.R., Part 125. Although the FWPCA defines "pollutants" as including, *inter alia*, "radioactive materials * * * discharged into water," 33 U.S.C. (Supp. III) 1362(6), the Administrator concluded that Congress did not intend to subject to FWPCA controls by-product, source, or special nuclear material, which was already extensively regulated by the AEC under the Atomic Energy Act of 1954. Accordingly, 40 C.F.R. (1973 rev.) 125.1(x)[8] excludes those materials from the EPA permit program.

3. *The Proceedings Below.* Respondents commenced this suit under Section 505 of the FWPCA, 33 U.S.C. (Supp. III) 1365, which consents to "citizen suits" against EPA to require it to perform nondiscretionary duties under the FWPCA. Respondents alleged that the FWPCA required the EPA to define effluent limitations for all radioactive materials, including those controlled under the Atomic Energy Act of 1954.

The district court concluded that "two agencies of peculiar and extreme expertise" (App. C, *infra*, p. 21a), the AEC and the EPA, were correct in their conclusion that the FWPCA does not apply to source, special nuclear, and by-product material. The court relied upon the legislative history of the FWPCA (App. C, *infra*, p. 22a) and on the "wasted effort, * * * confusion, and possible danger to the public" likely to result from dual regulation (App. C, *infra*,

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[8] This subsection was subsequently redesignated 125.1(y). 38 Fed. Reg. 19895 (July 24, 1973).

p. 23a). The court also stated that requiring EPA to regulate effluents from AEC-licensed plants might have an adverse effect on energy supplies (App. C, *infra*, p. 26a).

The court of appeals reversed, holding that the plain meaning of the FWPCA requires the EPA to regulate discharges of all radioactive materials, including those controlled by the AEC.[9] Therefore, the court of appeals decided, "there is no need to address ourselves to the ofttimes difficult task of ascertaining legislative intent through legislative history" (App. B, *infra*, p. 12a). In the court's view, exclusive control over these materials had not been reserved to the Atomic Energy Commission by the Atomic Energy Act of 1954 because the FWPCA constituted a later expression of congressional intent to "vest the Environmental Protection Agency with the duty" of regulating such material (App. B, *infra*, p. 16a). The court concluded that the FWPCA was to that extent inconsistent with the Atomic Energy Act (*id.* at p. 14a).

REASONS FOR GRANTING THE WRIT

The decision below significantly impedes efforts to develop a nationwide system of nuclear power generation. By creating a redundant regulatory system

[9] The States of Arkansas, Kansas, Michigan, Minnesota, Pennsylvania, and Washington participated as *amici curiae* in the court of appeals, claiming that the 1972 changes to the FWPCA required the Administrator and the States to control all radioactive effluents.

for plant discharges, thereby fragmenting regulatory responsibility for nuclear facilities, the decision makes it more difficult to ensure uniform and consistent regulations, and the uncertainties it creates promise to delay construction and operation of nuclear power plants during a time of national energy shortages.[10] It does this despite clear indications that Congress intended no such result, and despite the lack of any desirable policy that would be served by such a regulatory pattern.

Each nuclear power facility is enormously complex. Its reliability depends not only on the proper functioning of each component system, but also on the proper interrelationship of the systems. The plant is, and must be assessed as, a unit, rather than simply a group of systems serving specific functions. Thus, decisions regarding the types and amounts of radioactive waste that may be discharged from a plant, and the extent to which any of these discharges may be to the air or water, necessarily must take into account the design and operation of the plant.[11] All these decisions together must produce a safe and efficient plant, with discharges which will not ad-

[10] Presently, 116 nuclear power plants have been licensed by NRC to operate or to be constructed; applications to build 74 others are pending.

[11] For example, a plant could be designed to minimize radioactive effluent discharges by permitting somewhat greater airborne discharges; this design decision could affect not only the discharge systems, but also the method of operation of the facility, and the types of controls required for safety.

versely affect either the public health and safety or the environment.

Until the decision below, NRC, and its predecessor, the AEC, had exclusive regulatory jurisdiction over the design of nuclear power facilities and had exclusive authority to regulate their radioactive waste discharges. *Northern States Power Co.* v. *Minnesota*, 447 F.2d 1143 (C.A. 8), affirmed, 405 U.S. 1035.[12] This centralization of control and responsibility in a single agency ensured that all interrelated aspects of facility design received consistent and coherent review, and minimized problems of interagency coordination in review of a single project. See *Northern States Power Co.* v. *Minnesota, supra*, 447 F.2d at 1153.[13] The court of appeals, however, has now created overlapping regulatory authority among two federal agencies at least in regard to discharges from nuclear plants into the water.

Moreover, the opinion below creates uncertainty in an area where certainty is essential. The planning and construction of nuclear power facilities is a costly, long-range undertaking. The time from a

[12] The EPA, in contrast, has authority to establish generally applicable environmental standards for radioactive materials in the environment, but had no direct authority over the discharges from the plants themselves. Reorganization Plan No. 3 of 1970, Section 2(a)(6), 84 Stat. 2086, 2088; Memorandum of Understanding, 38 Fed. Reg. 2713 (January 29, 1973).

[13] Centralization is similarly important in the design, construction and operation of government-owned nuclear research and production facilities, including those in which nuclear weapons are produced.

utility's initial decision to construct a nuclear facility to the full-scale operation of that facility typically is from eight to ten years; and the costs range from a quarter of a million to more than a billion dollars. It is thus extremely important to a utility considering whether to undertake such a venture that the standards with which the completed plant must comply are accurately predictable at the outset. Further, a utility is unlikely to start a venture of this size if there is any substantial uncertainty that the necessary permits for the operation of the facility will be available.

Because of its responsibility for protecting the public health and safety and the environment,[14] the AEC (and now the NRC) has acquired a high degree of expertise in regard to the many possible effects of discharges of nuclear wastes into water. See *Crowther* v. *Seaborg*, 312 F. Supp. 1205, 1220 (D. Colo.). It has issued regulations, reflecting this expertise, which restrict discharges into the environment, including the water. 10 C.F.R., Part 20; 50.34a; 50.36a. These regulations are implemented by the NRC through design criteria for nuclear facilities. If EPA must now establish its own standards, and issue its own regulations covering discharges of precisely the same wastes, confusion and uncertainty are very likely to result. If the EPA standards turn out to be different from those currently applicable,

[14] See 42 U.S.C. 4331, *et seq.*

facility designs and operations would have to be revised to accommodate them, with potential delays, expenses and safety problems to be resolved. If they are the same as the AEC standards, nothing will have been gained by the duplication; the procedures and paperwork necessary to construct and operate a nuclear power plant will simply have been increased, in contravention of the policy of the FWPCA. 33 U.S.C. (Supp. III) 1251(f).

In addition, the decision below may be read by some States as authorizing them to impose radioactive effluent limitations more stringent than those adopted by EPA (see *amicus curiae* brief of Arkansas, Kansas, Michigan, Pennsylvania and Washington below, p. 4). While we believe that this interpretation is incorrect, it is colorable, in view of the emphasis in the FWPCA on the primary responsibility of the States for controlling water quality. 33 U.S.C. (Supp. III) 1251(b).[15]

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[15] *Northern States Power Co.* v. *Minnesota, supra,* held that the Atomic Energy Act of 1954 gave the AEC exclusive authority to regulate discharges from nuclear facilities. The court below read the FWPCA as indicating a congressional reconsideration of the necessity for retaining sole regulatory control in the AEC (App. B, *infra,* p. 16a). But a proposed amendment which would have permitted the States to impose limitations on the discharges of radioactive materials more stringent than the federal limitations was defeated in the House of Representatives by a vote of 106 to 36, after concern was expressed in debate that the effect of the amendment would be to amend the Atomic Energy Act of 1954 and reverse the decision in *Northern States.* 118 Cong. Rec. 10648-10654; 1 Committee Print, A Legislative History of the Water

The uncertainty about the States' authority to license such discharges, and, if they have the authority, the manner in which they will exercise it, will have a profoundly discouraging effect on plans to construct nuclear power plants. Since the design of the plant depends on its site, decisions about siting must be made in the earliest planning stages. Extremely restrictive state standards could effectively prohibit the construction of nuclear power plants within the State.[16] Therefore, if the FWPCA applies to radioactive discharges from nuclear plants, as the court below held, plants may simply not be planned for States where such restrictive regulation might be anticipated [17] until the question of state authority to

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Pollution Control Act Amendments of 1972 Together With A Section-by-Section Index, prepared by the Environmental Policy Division of the Congressional Research Service of the Library of Congress, 93d Cong., 1st Sess., 542-557 (hereafter "Leg. Hist.").

[16] Such standards, if applicable to federal facilities, could also prevent the construction of federal nuclear facilities. We argue in our pending petition for a writ of certiorari in *Seeber* v. *State of Alabama,* No. 74-851, that federal facilities need not obtain state air pollution control permits. We would also argue that they need not obtain state effluent permits, but this contention has been rejected by one court of appeals, which noted that, because of distinctions between the relevant federal statutes, decisions involving one type of state permit may not control in cases involving the other type. *California* v. *Environmental Protection Agency,* C.A. 9, No. 73-2466, decided February 13, 1975, slip op. 17.

[17] Eleven states have bills pending before their legislatures which attempt either to impose a complete moratorium on the construction of nuclear power plants or to restrict such construction severely. These states are: Connecticut, Indiana,

regulate those discharges is finally resolved."

These problems are of substantial concern to the utilities considering the construction of nuclear facilities, and may seriously affect the national interest in having adequate supplies of energy for future needs. See App. C, *infra*, p. 26a. The Federal Energy Administration, whose function is to "advise the President and the Congress with respect to the establishment of a comprehensive national energy policy," P.L. 93-275, 88 Stat. 96, 99, believes that the decision below may "adversely impact upon any expansion of the role of nuclear power in meeting the nation's energy needs, and thereby serve to frustrate the President's stated goal of having 200 major nuclear power plants within the next ten years" (App. D, *infra*, p. 31a).

Congress did not intend the FWPCA to have any such effect. The court below concluded that the statutory language was clear, and that resort to legislative history was therefore inappropriate (App. A, *infra*, pp. 12a-13a). This approach to statutory interpretation has been repeatedly rejected by this Court. See, *e.g.*, *Boston Sand & Gravel Co.* v. *United States*, 278 U.S. 41, 48; *Cass* v. *United States*, 417 U.S. 72, 77-79.

Iowa, Kansas, Massachusetts, Minnesota, Missouri, Nebraska, Oklahoma, Oregon, and Wisconsin. Vermont recently enacted such legislation. In addition, California has a pending initiative designed to impose severe restraints on such construction, and the Texas legislature has asked its congressional delegation to propose national legislation to that effect.

[18] Even if a utility were willing to risk the uncertainty and plan a facility in such a State, financing the venture might well be impossible because of lenders' unwillingness to take that risk.

The term "radioactive materials," which is nowhere defined in the FWPCA, is ambiguous in light of the other provisions of that Act and of the Atomic Energy Act. See *Chemehuevi Tribe of Indians* v. *Federal Power Commission*, No. 73-1380, decided March 3, 1975, slip op. 7-8; *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U.S. 235, 250. In 33 U.S.C. (Supp. III) 1371(a)(1), Congress specifically stated that the FWPCA is not to be construed as limiting the authority of any federal agency under any other law not inconsistent with the FWPCA. Congress also required in 33 U.S.C. (Supp. III) 1251(f) that the Act be implemented in a way that "prevents needless duplication and unnecessary delays at all levels of government." Since the Act supplements, but does not override or duplicate, related statutory provisions, Congress could not have intended to require the EPA to regulate the type of radioactive waste material already extensively and comprehensively controlled under the Atomic Energy Act of 1954.

The legislative history of the FWPCA fully supports the conclusion that Congress intended to leave exclusive control of such effluents to the AEC. The House Committee Report, H. Rep. No. 92-911, 92d Cong., 2d Sess. 131, 1 Leg. Hist. 753, 818, could hardly be more explicit:

> The term "pollutant" as defined in the bill includes "radioactive materials." These materials are those not encompassed in the definition of

> source, byproduct, or special nuclear materials as defined by the Atomic Energy Act of 1954, as amended, and regulated pursuant to that Act. "Radioactive materials" encompassed by this bill are those beyond the jurisdiction of the Atomic Energy Commission. Examples of radioactive material not covered by the Atomic Energy Act, and, therefore, included within the term "pollutant," are radium and accelerator produced isotopes."

The Senate debates indicate that this interpretation of the statutory language was shared by that body as well (2 Leg. Hist. 1265-1266).

Congress realized full well that regulation of the same subject by separate federal agencies, and the consequent problems that might arise from varying requirements, each aimed at achieving the same goal in a different way, would be particularly undesirable in regard to radioactive material used, produced and discharged from nuclear facilities. However, by requiring the EPA to promulgate regulations dealing with the discharge of this material into the water and to include such discharges in its own independent permit program, the court below has created a redundant pattern of regulation, with all the problems and uncertainties Congress sought to avoid. In short, the decision of the court of appeals is contrary to the FWPCA, and does nothing to advance the national policy of protecting the environment. Indeed, the regulatory system that would evolve if this decision stands is one that would be, in our view, contrary to the public interest.

[19] The Conference bill, which was enacted (1 Leg. Hist. 282), contains an identical definition of "pollutant." 1 Leg. Hist. 326-327. Representative Harsha, a member of the Conference Committee, explained to the House that in this respect the Conference bill "in no way detracted from the intent of the language in" the House bill, and that the term "radioactive materials" in the conference bill continued to refer only to materials not within the jurisdiction of the AEC (1 Leg. Hist. 226-227).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1975.

APPENDIX A

NOVEMBER TERM—DECEMBER 9, 1974

Before The Honorable William J. Holloway, Jr., The Honorable Robert H. McWilliams, Circuit Judges and The Honorable A. Sherman Christensen, District Judge *

No. 74-1154

(D. C. No. C-5438)

COLORADO PUBLIC INTEREST RESEARCH GROUP, INC., a nonprofit Colorado Corporation, COLORADO ENVIRONMENTAL LEGAL SERVICES, INC., a nonprofit Colorado Corporation, MORGAN SMITH, FRANK ANDERS, A. M. WINCHESTER, and FRANK L. BOULTER, PLAINTIFFS-APPELLANTS

v.

RUSSELL TRAIN, as Administrator of the United States Environmental Protection Agency; and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, DEFENDANTS-APPELLEES

This cause came on to be heard on the record on appeal from the United States District Court for the District of Colorado, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of said court is reversed. The cause is remanded to the United States District Court for

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* Of The District of Utah, sitting by Designation.

the District of Colorado for further proceedings in accordance with the opinion of this court.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 74-1154

COLORADO PUBLIC INTEREST RESEARCH GROUP, INC., a nonprofit Colorado Corporation, COLORADO ENVIRONMENTAL LEGAL SERVICES, INC., a nonprofit Colorado Corporation, MORGAN SMITH, FRANK ANDERS, A. M. WINCHESTER, and FRANK L. BOULTER, PLAINTIFFS-APPELLANTS

v.

RUSSELL TRAIN, as Administrator of the United States Environmental Protection Agency; and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, DEFENDANTS-APPELLEES

Appeal from the United States District Court
for the District of Colorado

(D. C. No. C-5438)

David C. Mastbaum and James L. Kurtz-Phelan (David E. Engdahl on the brief), for Plaintiffs-Appellants.

Dirk D. Snel, Attorney, Department of Justice (Wallace H. Johnson, Assistant Attorney General, James L. Treece, United States Attorney, William K. Hickey, Assistant United States Attorney, and Edmund B. Clark and Michael D. Graves, Attorneys, Department of Justice, on the brief), for Defendants-Appellees.

Jim Guy Tucker, Attorney General of Arkansas; Vern Miller, Attorney General of Kansas; Frank J. Kelley, Attorney General of Michigan; William M. Eichbaum, Deputy Secretary for Enforcement and General Counsel, Pennsylvania Department of Environmental Resources; and Slade Gorton, Attorney General of Washington; on the brief of The State of Arkansas, The State of Kansas, The State of Michigan, The Commonwealth of Pennsylvania, and The State of Washington, as Amici Curiae.

Warren Spannaus, Attorney General; Peter W. Sipkins, Solicitor General; and Eldon G. Kaul, Special Assistant Attorney General; on the brief of The State of Minnesota, as Amicus Curiae, and joint brief of the Minnesota Pollution Control Agency, as Amicus Curiae.

Before HOLLOWAY and McWILLIAMS, Circuit Judges, and CHRISTENSEN*, District Judge.

McWILLIAMS, Circuit Judge.

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* Of the District of Utah, sitting by designation.

This is a citizen suit brought by plaintiffs against the United States Environmental Protection Agency, and Russell Train as its Administrator, wherein the plaintiffs, under the provisions of the Federal Water Pollution Control Act, as amended, sought to compel the Administrator to perform what was alleged to be a nondiscretionary duty to control discharges of radioactive materials into navigable waters. Both plaintiffs and defendants moved for summary judgment on the ground that there were no genuine issues of fact and both agreed that the sole issue was a pure question of law as to the meaning of the Federal Water Pollution Control Act, as amended, 33 U.S.C. § 1251, *et seq.* (Supp. 1973). The trial court granted defendants' motion for summary judgment and entered summary judgment for defendants.[1] Plaintiffs now appeal the judgment thus entered. We reverse.

We are here concerned with the amendments made in 1972 to the Federal Water Pollution Control Act, and the regulations issued pursuant thereto. The amendments thus made to the Act will hereinafter be referred to as the 1972 Amendments. This is a statutory construction case, and accordingly we shall now refer to the particular statutes and administrative regulations with which we are here concerned.

33 U.S.C. § 1311(a) (Supp. 1973) provides, in effect, that the discharge of any pollutant by any

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[1] *See* Colorado Public Interest Group, Inc. v. Train, 373 F.Supp. 991 (D.C.Colo. 1974).

person into navigable waters shall be unlawful except in compliance with the various sections of the 1972 Amendments. Under 33 U.S.C. § 1342(a)(1) (Supp. 1973) the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, upon the meeting of such conditions as the Administrator determines to be necessary to carry out the several provisions in the Act, as amended.

33 U.S.C. § 1362(6) (Supp. 1973) defines "pollutants" and reads as follows:

> "The term 'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, *radioactive materials*, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. *This term does not mean* (A) 'sewage from vessels' within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources." (Emphasis added).

The Administrator, pursuant to his obligations under 33 U.S.C. § 1342 (Supp. 1973), issued regulations which became effective July 1, 1973, regarding permits to discharge pollutants. 40 C.F.R. § 125.1(x) (1973) reads in pertinent part as follows:

> "§ *125.1 Definitions*
>
> "(x) The term 'pollutant' means * * * radioactive materials * * * discharged into water. [Fifteen other listed pollutants omitted.] * * *.
>
> "COMMENT.—The legislative history of the [Federal Water Pollution Control] Act 'Amendments of 1972' reflects that the term 'radioactive materials' as included within the definition of 'pollutant' in section 502 of the Act covers only radioactive materials which are not encompassed in the definition of source, by-product, or special nuclear materials as defined by the Atomic Energy Act of 1954, as amended, and regulated pursuant to the latter Act. Examples of radioactive materials not covered by the Atomic Energy Act and, therefore, included within the term 'pollutant' are radium and accelerator produced isotopes. (H.R.Rep. 92-911, 92d Cong. 2d Sess., 131, March 11, 1972; 117 Cong.Rec. 17401, daily ed., November 2, 1971; 118 Cong.Rec. 9115, daily ed., October 4, 1972.)"

The foregoing COMMENT is at the heart of the present dispute and perhaps deserves a rereading.

Another section of the 1972 Amendments, 33 U.S.C. § 1371(a) (Supp. 1973), relied on by the defendants, reads in pertinent part as follows:

> "This chapter shall not be construed as (1) limiting the authority or functions of any officer or agency of the United States under any other law or regulation *not inconsistent with this chapter*; * * *." (Emphasis added).

Although neither is a party to the present proceeding, the Atomic Energy Commission and the Public Service Company of Colorado are to a degree, at least, involved. The Atomic Energy Commission owns the Rocky Flats Plant located between Golden and Boulder, Colorado, which plant until recently has been operated for the Commission by the Dow Chemical Company. The Public Service Company of Colorado under license from the Atomic Energy Commission owns and maintains the Fort St. Vrain Nuclear Generating Station located at Platteville, Colorado. Radioactive materials, including "by-products materials," "source material," and "special nuclear material" are, or will be, discharged into navigable waters within the state of Colorado by operation of the Rocky Flats Plant and the Fort St. Vrain Nuclear Generating Station. We are advised that both nuclear facilities have applied to the EPA Administrator for a permit to authorize the discharge of liquid effluents into Colorado waters and that in each instance the Administrator, in line with the COMMENT set forth above, has refused to regulate the discharge of radioactive materials from these facilities.

It was in this general setting that the plaintiffs brought their citizen suit as provided in 33 U.S.C. § 1365(a)(2) (Supp. 1973) against the Administrator seeking to compel him to exercise his regulatory duties under the 1972 Amendments as concerns the discharge of radioactive materials into navigable waters. It is the plaintiffs' basic position that the

statute means what it says, and that under the definition of "pollutant," as set forth in 33 U.S.C. § 1362 (6) (Supp. 1973), it is the duty of the Administrator to regulate the discharge of *all* radioactive materials into navigable waters.

The defendants' basic position is as set forth above in the COMMENT to 40 C.F.R. § 125.1(x) (1973), namely, that those radioactive materials which are "by-product materials," "source material," and "special nuclear material" are not encompassed in the 1972 Amendments and are hence subject to only such regulation as is provided under the Atomic Energy Act of 1954. The trial court adopted the view of the Administrator and it was on this basis that summary judgment was entered for the defendants. We disagree with this disposition of the matter. Brief reference to the general law relating to statutory construction may be helpful.

It is a basic rule of statutory construction that statutes are to be construed in a manner so as to effectuate the intent of the enacting body, and that in construing a statute the court should first look to the language of the statute itself. If the language is clear and the purpose appears with reasonable certainty, there is no need to resort to other rules of construction to ascertain its meaning. United States v. Ray, 488 F.2d 15 (10th Cir. 1973). An unambiguous statute must be given effect according to its plain and obvious meaning. United States v. Western Pacific Railroad Company, 385 F.2d 161 (10th Cir. 1967).

Another cardinal rule of statutory construction is that where the legislature has acted to except certain categories from the operation of a particular law, it is to be presumed that the legislature in its exceptions intended to go only as far as it did, and that additional exceptions are not warranted. In other words, where there be express exceptions to a statute, additional exceptions by implication are not favored. *In re* Monks Club, Inc., 394 P.2d 804 (Wash. 1964), and Knapczyk v. Ribicoff, 201 F. Supp. 283 (N.D.Ill. 1962). *See also* 2A Sands, Statutes and Statutory Construction, § 47.11 (4th ed. 1973), where it is stated that when there is an express exception to a statute, no other exceptions will be implied. *See also* § 47.07 in that same treatise which states, in part, that a statute which declares what a term "means," is to be given a strict interpretation and is not subject to expansion. Here, the statute declares not only what the term pollutant "means," but what it "does not mean."

And a final rule of construction which has applicability to the present controversy is that the legislative history of a statute cannot be used to change the meaning of a clear and unambiguous statute. United States v. Oregon, 366 U.S. 643 (1961), and *Ex Parte* Collett, 337 U.S. 55 (1949). Or, as was well stated in Gemsco, Inc. v. Walling, 324 U.S. 244, at 260 (1945), "the plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction." *See also* United States v. Zions Savings & Loan Association, 313 F.2d 331 (10th Cir. 1963), and Haskell v. United States, 241 F.2d 790 (10th Cir. 1957).

Keeping these general rules in mind let us look at the various statutory provisions with which we are here concerned. It was the expressed general intent of Congress in the 1972 Amendments to enact a comprehensive program looking towards the eventual elimination of all pollution of the Nation's waterways so as to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251 (1973 Supp.). And the term "pollution" was defined as meaning "the man-made or man-induced alteration of the chemical, physical, biological and radiological integrity of water." 33 U.S.C. § 1362(19) (Supp. 1973). The EPA Administrator was generally charged with carrying out the intent behind the 1972 Amendments, and was specifically charged with the administration and enforcement of the several provisions of the statute.

In essence the sections referred to at the outset of this opinion prohibit the discharge of pollutants into navigable waters unless a permit to do so be granted by the EPA Administrator, and the EPA Administrator in considering a request to thus discharge pollutants is subject to the various requirements and limitations provided for in the Act and amendments thereto. The statute then defines the term "pollutant," and states that among other things the term

"polluant means • • • radioactive materials • • •." The statute does not say "some" radioactive materials, or radioactive materials "except for," just "radioactive materials." So, it would seem to us that if we give the words thus used in the statute their plain and obvious meaning, the EPA Administrator is charged with the duty of regulating the discharge of radioactive materials into navigable waters. No exceptions having been set forth in the statute as concerns radioactive materials, it would follow that the term "radioactive materials" means *all* radioactive materials, and we so hold.

We are fortified in our conclusion in this regard by the fact that the statute defining "pollutants" does contain two exceptions, neither of which modifies the term "radioactive materials." Under the rule of construction referred to above, where a statute contains express exceptions, the courts should be exceedingly slow in implying unexpressed exceptions, lest the courts thereby thwart the legislative intent.

In our view, then, the statute is plain and unambiguous and should be given its obvious meaning. Such being the case, under the authorities above cited, we need not here concern ourselves with the legislative history of the 1972 Amendments. In this regard we would note parenthetically that in our view the legislative history of the 1972 Amendments is conflicting and inconclusive. Be that as it may, in the case before us there is no need to address ourselves to the ofttimes difficult task of ascertaining legislative intent through legislative history. Here,

the legislative intent is clearly manifested in the language of the statute itself, and we need not resort to legislative history. United States v. Oregon, *supra*, and *Ex Parte* Collett, *supra*.

As indicated, the main thrust of the defendants' argument in this court is that if there is not in fact an ambiguity in the 1972 Amendments, at least the 1972 Amendments are possessed of an "unfinished character" which requires it to be juxtaposed with the Atomic Energy Act of 1954. The defendants urge that if the 1972 Amendments be so considered, then "by-products materials," "source material," and "special nuclear material" are under the Atomic Energy Act of 1954 specifically subjected to the control of the Atomic Energy Commission, which control includes the exclusive power to regulate the discharge of such radioactive materials; and that the Atomic Energy Commission has been, and is, thus regulating the discharge of such radioactive materials. Thus, according to the defendants, the Administrator under the 1972 Amendments only regulates the discharge of "other" radioactive materials, such as radium and accelerator produced isotopes. All of which is of course in line with the COMMENT of the EPA in 40 C.F.R. 125.1(x) (1973). Suffice it to say that this line of argument does not square with our reading of the 1972 Amendments. In this regard we are of course mindful of the rule that the construction given a statute by the administrative officer charged with carrying out its provisions is to be given weight. Board of Dir. & O., Forbes Fed.

Cr. U. v. National Cr. U. Adm., 477 F.2d 777 (10th Cir. 1973). However, such should not be permitted to overrule the express language of a statute, else the administrative officer will himself be thwarting the will of Congress. Or, as was said in Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 315 (1933), "administrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction."

In support of its general line of reasoning the defendants cite that section of the statute which states that the 1972 Amendments are not to be construed as limiting the functions of any officer or agency acting under any other law or regulation "not inconsistent with this chapter." 33 U.S.C. § 1371(a) (Supp. 1973). Our answer to that is that the 1972 Amendments are inconsistent, in the particulars indicated, with the Atomic Energy Act of 1954.

We are advised that this is a case of first impression. However, a case which addressed itself to a somewhat similar problem is Scenic Hudson Preservation Conference v. Callaway, 370 F.Supp. 162 (S.D.N.Y. 1973). The 1972 Amendments provide that a permit to discharge dredged or fill material is to be obtained from the Secretary of the Army, acting through the Chief of Engineers, rather than the Administrator. 33 U.S.C. § 1344 (Supp. 1973). However, Consolidated Edison, which was in the process of trying to build a hydroelectric generating plant, contended that since it was under the general jurisdiction of the Federal Power Commission, it was

not required to get a permit from the Army Corps of Engineers. In rejecting such contention, that court stated as follows:

> "* * * Con Ed would infer an exception from the Amendments for hydroelectric plants on the theory that Congress could not have intended to interfere with the jurisdiction of the FPC in view of the long settled policy, discussed above, of allowing that agency unique control over the production of hydroelectric power. The argument is persuasive at first blush, but even more plausible is plaintiffs' contention that Congress would not design an Act which on its face is all-inclusive, but for specifically enumerated exceptions, and yet intend to establish an unmentioned exception of the scale suggested here. Without any indication that Con Ed's reading of the Congressional will is accurate, the carving out of so major an exception would be improper. If this was Congress' intention and the omission is mere oversight, the remedy rests in Congress' hands, and Congress has shown, by its recent amendments to the Alaska pipeline legislation, that it will not hesitate to remove an obstacle to energy production when it believes a change of requirements is necessary in the public interest."

We generally concur with the reasoning of this *Scenic Hudson* case. We are advised in the instant case that "by-product material," source material," and "special nuclear materials" constitute virtually all of the radioactive materials that are of significant concern to water quality, and if such materials

are excepted from the 1972 Amendments, then the exception is devouring the general policy of the statute. Edward B. Marks Music Corp. v. Colorado Mag., Inc., 497 F.2d 285 (10th Cir. 1974). In any event, if in the 1972 Amendments Congress intended to except "by-product materials," "source material," and "special nuclear material" when it used the unmodified term "radioactive material," then the omission should be corrected by Congress, and not the courts.

A case mentioned by the trial court in its memorandum opinion and cited here by the defendants is Northern States Power Company v. State of Minnesota, 447 F.2d 1143 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972). We do not deem that case to be particularly helpful in our resolution of the present case. That case stands for the proposition that Congress in enacting the Atomic Energy Act of 1954 preempted the field to the exclusion of the several states as concerns the regulation of radioactive waste releases from nuclear power plants. Assuming the correctness of this proposition, such does not mean that Congress is thereafter foreciosed from later deciding, as we believe it did, to vest the Environmental Protection Agency with the duty of regulating the discharge of all radioactive materials into navigable waters.

In sum, then, the 1972 Amendments charge the EPA Administrator with the duty of regulating the discharge of all radioactive materials into the Na-

tion's waters, and the trial court erred in granting the defendants' motion for summary judgment.

The trial court denied plaintiffs' request for reasonable attorney fees as provided in 33 U.S.C. § 1365 (d) (Supp. 1973). Plaintiffs appeal this ruling and contend that such constituted an abuse of discretion on the part of the trial court. In view of our disposition of the appeal, we need not here address ourselves to the merit of that particular matter.

Judgment reversed and cause remanded for further proceedings consonant with the views herein expressed.

[December 9, 1974]

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. C-5438

COLORADO PUBLIC INTEREST RESEARCH GROUP, INC., ET AL., PLAINTIFFS

vs.

RUSSELL TRAIN, as Administrator of the United States Environmental Protection Agency, and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, DEFENDANTS

MEMORANDUM OPINION GRANTING
SUMMARY JUDGMENT

WINNER, Judge

The case is before the Court on cross-motions for summary judgment, and the parties agree that there are no genuine issues of material fact. The case involves plaintiff's challenge of the accord worked out between and followed by the Atomic Energy Commission and the Environmental Protection Agency as to the correlation of the Federal Water Pollution Control Act and the Atomic Energy Act. Plaintiffs want the EPA to regulate the discharge of "byproduct materials," "source materials" and "special nuclear materials" from the Ft. St. Vrain Generating Facility, a privately owned nuclear electrical generating plant, and from the Rocky Flats Plant, a

federally owned plant. The EPA and the AEC think that the regulation of the discharge of these particular materials is under the exclusive jurisdiction of the AEC and that such regulation is not under either the exclusive or the concurrent jurisdiction of the EPA. The Public Service Company of Colorado, the owner of the Ft. St. Vrain facility, has not been named as a defendant. Defendants have not raised the indispensable party question, and no ruling is made on it. Certainly the problem exists.

As phrased by plaintiffs in their brief, "The only issue before the Court is whether all radioactive effluents are subject to regulation pursuant to the 1972 Amendments to the Federal Water Pollution Control Act. 33 U.S.C. § 1251, et seq. . . . Simply stated, it is our position that this administrative decision [to leave the regulation of such effluents to the AEC] is totally contrary to the clear and unambiguous language of the 1972 Amendments to the Federal Water Pollution Control Act."

Defendants concede that the Federal Water Pollution Control Act gives the EPA power to regulate the discharge of "pollutants" and that some radioactive materials are indeed pollutants. But, say defendants, "byproduct," "source" and "special nuclear materials" must be treated differently, and, defendants have concluded that, reading the two Acts together, the regulation of discharges of those materials is for the AEC alone.

Necessarily, then, the starting place is a definition of the critical terms, and they are defined by statute:

42 U.S.C. 2014 (e) defines "*byproduct material*" as "any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material."

42 U.S.C. 2014 (z) defines "*source material*" as "(1) uranium, thorium, or any other material *which is determined by the Commission* pursuant to the provisions of section 61 to be source material; or (2) ores containing one or more of the foregoing materials, in such concentration as the Commission may by regulation determine from time to time."

42 U.S.C. 2014 (aa) defines "*special nuclear material*" as "(1) plutonium, uranium enriched in the isotope 233 or in the isocope 235, and any other material which the Commission, pursuant to the provisions of section 51, determines to be special nuclear material, but does not include source material; or (2) any material artificially enriched by any of the foregoing, but does not include source material."

The Federal Water Pollution Control Act [33 U.S.C. § 1362 (6)] defines pollutants, and, included in a list of specified pollutants are "radioactive materials." The Environmental Protection Agency has in effect defined the "radioactive materials" included under its control in 38 Fed. Reg. 13530, published May 22, 1973:

> ". . . the term *radioactive materials* as included within the definition of *pollutant* in section 502 of the Act covers only radioactive materials

> which are *not* encompassed in the definition of source, byproduct or special nuclear materials as defined by the Atomic Energy Act of 1954."

At the outset, plaintiffs face the hurdle that two agencies of peculiar and extreme expertise reach a conclusion diametric to the position of plaintiffs, and, certainly, the determinations of these agencies in this highly technical area are entitled to great weight. The height of the hurdle which plaintiffs must clear is not lowered by their flailing at the alleged incompetence of the AEC and by their charges that the AEC is impervious to the need for environmental protection and to the requirements of public safety. Such may be plaintiffs' views, but I am more persuaded by the comments of Chief Judge Arraj in *Crowther* v. *Seaborg*, 312 F. Supp. 1205, 1235, and, by the conclusions of Judge Hill in *Crowther* v. *Seaborg*, 415 F. 2d 437:

> ". . . the Atomic Energy Commission and the other cooperating governmental agencies are exercising the highest degree of care, caution and expertise to prevent any possible damage to life, property and natural resources."

Significantly, in the 90 pages of brief and supporting material filed by plaintiffs, no mention is made of either decision in *Crowther* v. *Seaborg*, but I am more inclined to adopt the view of our Chief Judge and the views of the Tenth Circuit than I am the views of the author of some obscure magazine article relied upon in plaintiffs' brief. I totally reject all

arguments that the AEC and the EPA are not doing their best to protect the public health, safety and welfare. With the rejection of those arguments, there is not a great deal left of plaintiffs' brief, and, both parties being in agreement that there is no genuine issue of material fact, I grant defendants' motion for summary judgment. I grant it for these reasons:

1. Although plaintiffs can winnow a little solace from the 1725 pages of legislative history of the Water Pollution Control Act Amendments of 1972, the history overwhelmingly favors the interpretation placed on the Act and, more particularly, on § 502 of the Act, by the AEC and the EPA. That interpretation, oversimplified, is that the AEC has the exclusive jurisdiction over effluents from "source," "byproduct" and "special" nuclear materials. This legislative history must be read with the thought in mind that 33 U.S.C. § 1362 (6) mentions "radioactive materials," but it doesn't say *all* radioactive materials, and, with this thought in mind the legislative history, convinces me that Congress didn't intend to give the EPA jurisdiction over those materials. No point would be served by quoting the Congressional Record here, but I mention 117 Cong. Rec. S 17401-402; the Report of the House Committee on Public Works on H.R. 11896, and the floor debate on that bill, 118 Cong. Rec. H. 2639. Other portions of the Congressional Record support defendants' position.

2. Perhaps it is possible for both the EPA and the AEC to regulate wastes of "source," "byproduct" and "special" nuclear materials, but

for both to try to do so would be likely to create not only wasted effort, but, worse, confusion, and possible danger to the public. Recognizing that *Northern States Power Company* v. *State of Minnesota* (1971) 8 Cir. 447 F. 2d 1143, had to do with joint state and federal regulation and recognizing that the preemption problem was paramount in the case, nevertheless, many of Chief Judge Matthes' comments in the decision are fully applicable here. I quote from p. 1148-1149 of that opinion:

"Federal regulation over the processing and use of source, by-product and special nuclear material and over production and utilization facilities was insured in the 1954 amendments by means of this comprehensive licensing system required by the Act. Moreover, the importance with which Congress viewed the maintenance of a federal system of regulation and control in this area is revealed in its findings, which are replete with policy statements concerning the need for regulation in the national interest in order to provide for the common defense and security and to protect the health and safety of the public. 42 U.S.C. § 202.

"We are more concerned here with subsection (c) of § 2021 which *prohibits* the AEC from discontinuing its authority and responsibility with respect to the regulation of certain specified activities including 'the construction and operation of any production or utilization facility,' which would include the discharge of radioactive effluents from the facility or plant.

"There can be no doubt but the AEC control over 'the construction and operation of any pro-

duction or utilization facility' necessarily includes control over radioactive effluents discharged from the plant incident to its operation. In analyzing § 2021(c) (1) in the Hearings before the Joint Committee on Atomic Energy, Mr. Lowenstein of the AEC at p. 306 explained:

> 'The activities covered under this provision (i) include but are not limited to the possession and storage at the site of the licensed activity of nuclear fuel, and of source special nuclear material and by-product materials used or produced in the operation of the facility; and the transportation of nuclear fuels to and from the reactor site and the discharge of effluent from the facility.
>
> 'Coming to the question you asked before, Mr. Ramey [Executive Director, Joint Committee], the purpose of this provision is to retain under Commission regulatory control the operation of the reactor. We did not feel that we could begin to cut up that into pieces, so to speak. The discharge of effluent from the reactor involve many questions relating to the design and construction and operating procedures. We did not think it could be considered by itself and broken away from overall responsibility for the reactor operation.'

"However, Minnesota interprets this subsection only as prohibiting *total* relinquishment by the federal government over nuclear power plants, but does not view the concurrent exercise of state control over nuclear facilities as being forbidden by the Act.

> "We cannot agree with Minnesota's position that dual control over atomic power plants and the level of effluents discharged therefrom is permissible under the Act. While the 1959 amendment does not use the terms 'exclusive' or 'sole' in describing existing regulatory responsibilities of the Commission, we think it abundantly clear that the whole tone of the 1959 amendment, upon examination of the statutory language alone, demonstrates Congressional recognition that the AEC at that time possessed the sole authority to regulate radiation hazards associated with by-product, source, and special nuclear materials and with production and utilization facilities." [Emphasis by the Court.]

The dissent in *Northern States Power Company* is much in line with the arguments of plaintiffs here, but I agree with the majority opinion in that case.

> 3. Threading through the two *Crowther* v. *Seaborg* opinions and through *Northern States Power Company* is the thought that when we deal with nuclear power, we are in the most highly specialized and potentially dangerous area known to our civilization. The EPA has enough problems without exercising joint jurisdiction with the AEC. We must make haste slowly in taking from the AEC the exclusive power to regulate and control nuclear energy. As I read the statute and its legislative history, Congress has not said that it wants the EPA to enter this dangerous field. It has given the AEC control, and I think that it has given the AEC exclusive control. I cannot find that the AEC and the EPA were in error in their read-

ing of the statute and in their reading of the Congressional intent.

4. An additional, although not controlling reason for my ruling is the energy crisis. To grant the relief requested by plaintiffs might shut down the federally owned Rocky Flats Plant and it would inevitably delay the coming on stream of the Ft. St. Vrain Generating Facility. I need not and do not rule on defendants' argument that plaintiffs have other remedies available to them. I simply hold that if the Rocky Flats Plant is to be shut down, or if the Ft. St. Vrain Generating Facility is to be shut down or slowed down while new rules, regulations and standards are studied and adopted by the EPA, it will be by order of an appellate court and not by order of this court.

These are the reasons I have granted defendants' motion for summary judgment. This leaves unresolved plaintiffs' lawyers claim for attorneys fees to be awarded against the government. The statute [33 U.S.C. § 1365 (d)] permits the award of "costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such an award is appropriate." Plaintiffs' lawyers say that this permits an award of attorneys fees against the government even when the government prevails. This goes somewhat against my training and experience as a lawyer possessed of much experience in losing contingent fee cases. However, even if plaintiffs' lawyers are correct in their position that the government should pay losing

counsel, I do not deem it appropriate that they be subsidized with taxpayers' money in this case, and I deem it inappropriate to award them attorneys fees. Accordingly, the request for an award of attorneys fees is denied, and summary judgment shall enter against plaintiffs and in favor of the defendants.

Dated at Denver, Colorado, this 15th day of February, 1974.

/s/ Fred M. Winner
United States District Judge

APPENDIX D

FEDERAL ENERGY ADMINISTRATION
Washington, D.C. 20461

[SEAL] Office of the Administrator

March 10, 1975

Honorable Robert H. Bork
Solicitor General
Department of Justice
Constitution Avenue & 10th Street, N.W.
Washington, D.C. 20530

Dear Mr. Bork:

The Federal Energy Administration was established by Public Law 93-275 to, among other things, "advise the President and the Congress with respect to the establishment of a comprehensive National energy policy . . ." It is appropriate in light of this advisory role of FEA that I bring to your attention the substantial adverse impact on the Nation's energy program that a recent decision of the U.S. Court of Appeals for the Tenth Circuit, *Colorado Public Interest Research Group* v. *Train* (No. 74-1154), could have, and respectfully request that you seek Supreme Court review of the decision if you believe there is a legal basis for doing so.

In the decision the Court held (reversing a lower U.S. District Court) that the Environmental Protection Agency (EPA) Administrator has a duty under the

Federal Water Pollution Control Act (FWPCA) to regulate liquid discharges of source, byproduct, and special nuclear materials from nuclear plants, including licensed nuclear power plants. The Court dismissed the argument by the Government that under the Atomic Energy Act only the Atomic Energy Commission (AEC), now the Nuclear Regulatory Commission (NRC), has authority over such discharges.

The decision could affect 116 nuclear plants throughout the country that have been licensed by NRC to operate or be constructed, as well as 74 other plants for which construction permit applications are pending before NRC. Nuclear power plays a vital role in the Nation's energy program, and a high priority has been placed on efforts to expedite and coordinate the Federal and State regulatory processes for the siting, construction, and operation of nuclear power plants. The cited decision will, at a minimum, result in the EPA and the NRC having dual regulatory authority over liquid discharges of source, byproduct, and special nuclear materials from nuclear plants. Proper allocation of responsibilities between NRC and EPA with respect to control over discharges of radioactive materials was the subject of careful consideration within the highest levels of the Administration in late 1973. AEC pointed out at that time that control over radioactive discharges from nuclear plants was intimately related to control over matters of plant design, that only AEC had comprehensive

legal authority over nuclear plant design matters, that in vesting EPA with certain general standard setting authority under Reorganization Plan No. 3 of 1970 there had been no intention to vest EPA with technical competence regarding complex matters of nuclear plant design, and that EPA regulation of discharges of radioactive materials would be contrary to sound public policy that needless and wasteful duplication of effort should be avoided. After careful consideration the decision was made (Memorandum from OMB Director Ash on behalf of the President, dated December 7, 1973) that only AEC should control discharges of radioactive materials. The Court of Appeals decision will have the effect of frustrating the policy considerations that went into this decision. Moreover, there is at least the possibility that the decision might also be construed to vest each of the individual States with authority over such discharges and, in effect, to undermine the decision in *Northern States Power* v. *Minnesota*, 447 F.2d 1143 (8th Cir. 1971), aff'd., 405 U.S. 1034 (1972). It is particularly important that the nuclear power industry be subject to comprehensive requirements by a single regulatory body to insure the development of a safe and reliable system of nuclear power generation.

In summary, the Court of Appeals' decision could result in conflicting regulation of nuclear power plants by two different Federal agencies and, depending upon interpretation, by as many as fifty different

State regulatory agencies as well. We are fearful that such a crazy-quilt pattern of conflicting regulation will adversely impact upon any expansion of the role of nuclear power in meeting the Nation's energy needs, and thereby serve to frustrate the President's stated goal of having 200 major nuclear power plants within the next ten years.

Sincerely,

FRANK G. ZARB
FRANK G. ZARB
Administrator

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No. 74-1270

In the Supreme Court of the United States

OCTOBER TERM, 1974

RUSSELL TRAIN, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
PETITIONERS,

v.

COLORADO PUBLIC INTEREST RESEARCH GROUP, INC., ET AL.,
RESPONDENTS.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI ON BEHALF OF BOSTON EDISON COMPANY, CAROLINA POWER & LIGHT COMPANY, CENTRAL MAINE POWER COMPANY, COMMONWEALTH EDISON COMPANY, THE CONNECTICUT LIGHT AND POWER COMPANY, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., THE DETROIT EDISON COMPANY, THE HARTFORD ELECTRIC LIGHT COMPANY, ILLINOIS POWER COMPANY, MAINE YANKEE ATOMIC POWER COMPANY, NEW ENGLAND POWER COMPANY, NIAGARA-MOHAWK POWER CORPORATION, NORTHEAST NUCLEAR ENERGY COMPANY, NORTHERN STATES POWER COMPANY, OMAHA PUBLIC POWER DISTRICT, POWER AUTHORITY OF THE STATE OF NEW YORK, PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, ROCHESTER GAS & ELECTRIC CORPORATION, SOUTHERN CALIFORNIA EDISON COMPANY, UNION ELECTRIC COMPANY, VERMONT YANKEE NUCLEAR POWER CORPORATION, WESTERN MASSACHUSETTS ELECTRIC COMPANY, WISCONSIN ELECTRIC POWER COMPANY AND YANKEE ATOMIC ELECTRIC COMPANY

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In the Supreme Court of the United States

OCTOBER TERM, 1974

RUSSELL TRAIN, Administrator of the Environmental Protection Agency, et al. Petitioners, v. COLORADO PUBLIC INTEREST RESEARCH GROUP, INC., et al. Respondents.	No. 74-1270

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI ON BEHALF OF BOSTON EDISON COMPANY, CAROLINA POWER & LIGHT COMPANY, CENTRAL MAINE POWER COMPANY, COMMONWEALTH EDISON COMPANY, THE CONNECTICUT LIGHT AND POWER COMPANY, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., THE DETROIT EDISON COMPANY, THE HARTFORD ELECTRIC LIGHT COMPANY, ILLINOIS POWER COMPANY, MAINE YANKEE ATOMIC POWER COMPANY, NEW ENGLAND POWER COMPANY, NIAGARA-MOHAWK POWER CORPORATION, NORTHEAST NUCLEAR ENERGY COMPANY, NORTHERN STATES POWER COMPANY, OMAHA PUBLIC POWER DISTRICT, POWER AUTHORITY OF THE STATE OF NEW YORK, PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, ROCHESTER GAS & ELECTRIC CORPORATION, SOUTHERN CALIFORNIA EDISON COMPANY, UNION ELECTRIC COMPANY, VERMONT YANKEE NUCLEAR POWER CORPORATION, WESTERN MASSACHUSETTS ELECTRIC COMPANY, WISCONSIN ELECTRIC POWER COMPANY AND YANKEE ATOMIC ELECTRIC COMPANY

Boston Edison Company, Carolina Power & Light Company, Central Maine Power Company, Commonwealth Edison Company, The Connecticut Light and Power Company, Consolidated Edison Company of New York, Inc., The Detroit Edison Company, The Hartford Electric Light Company, Illinois Power Company,

Maine Yankee Atomic Power Company, New England Power Company, Niagara-Mohawk Power Corporation, Northeast Nuclear Energy Company, Northern States Power Company, Omaha Public Power District, Power Authority of the State of New York, Public Service Company of New Hampshire, Rochester Gas & Electric Corporation, Southern California Edison Company, Union Electric Company, Vermont Yankee Nuclear Power Corporation, Western Massachusetts Electric Company, Wisconsin Electric Power Company and Yankee Atomic Electric Company ("Utilities") hereby respectfully move for leave to file a brief herein as *amici curiae* in support of the petition for certiorari filed by the Solicitor General on behalf of the Environmental Protection Agency and its Administrator ("EPA"). A copy of the brief Utilities would file if this motion is granted is submitted herewith.

The Solicitor General has consented to Utilities' participation herein as *amici curiae*. The consent of Respondent was requested through its counsel but was refused.

Utilities comprise investor-owned and public entities which provide electricity to their customers or construct and operate power plants on behalf of other Companies. In the aggregate, Utilities serve in excess of seventeen million customers, including customers in such large metropolitan areas as Chicago and New York City. Each of Utilities has an interest in one or more nuclear power plants for which construction permits or operating licenses have been issued by the Nuclear Regulatory Commission ("NRC") or for which construction permit applications are pending before the NRC. Utilities have spent billions

of dollars and are obligated to spend further billions of dollars in order to implement their commitment to the generation of electricity by means of nuclear power.[1]

The opinion of the Tenth Circuit of which review is sought erroneously holds that liquid nuclear waste material from facilities such as nuclear power plants are subject to the Federal Water Pollution Control Act Amendments of 1972 ("FWPCA"), 86 Stat. 816, 33 U.S.C. §1251 *et seq.* (Supp. II, 1972), and that EPA has responsibility for regulating such discharges. Thus, the Tenth Circuit's decision adds redundant regulation to comprehensive programs long implemented by the NRC and its predecessor under the Atomic Energy Act of 1954, 68 Stat. 919, 42 U.S.C. §§2011 *et seq.* (1970).

Utilities have a vital interest in this proceeding because the Tenth Circuit's decision would add substantial time and expense to the present exhaustive licensing process for nuclear power plants which is neither required by the FWPCA nor in the public interest. Under the FWPCA, the Tenth Circuit's decision may well lead to the involvement of state agencies, administering standards for nuclear waste materials established by EPA, with the inevitable consequence of overlapping, inconsistent regulation. This consequence in turn will lead to delays in the addition of needed electrical generating capacity and the utilization of scarce and expensive alternative fossil fuels.

[1]The number of customers served by Utilities, the number and capacity of the nuclear facilities to which Utilities are committed, the percentage of Utilities' capacity served by nuclear power plants and the anticipated service dates of units presently uncompleted are set forth in Appendix A to the brief which is submitted herewith.

Petitioner has emphasized the federal interest in a coherent and consistent national system of regulation of nuclear power plants. Utilities, in their brief in support of the petition for certiorari, emphasize the chaotic impact which successive layers of regulation would have upon the design and construction of nuclear power plants.

Utilities believe that their experience with nuclear regulatory matters, and their ability to describe the implications of duplicate regulation of liquid nuclear wastes by NRC and EPA, will provide a useful practical and legal perspective that will assist this Court's consideration of the important issues presented here.

Respectfully submitted,

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April 18, 1975

No. 74-1276

In the Supreme Court of the United States

OCTOBER TERM, 1974

RUSSELL TRAIN, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.
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COLORADO PUBLIC INTEREST RESEARCH GROUP, INC., ET AL.,
RESPONDENTS.

BRIEF AMICUS CURIAE
IN SUPPORT OF PETITION FOR CERTIORARI
ON BEHALF OF
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April 18, 1975

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In the Supreme Court of the United States

OCTOBER TERM, 1974

RUSSELL TRAIN, Administrator of the Environmental Protection Agency, et al. Petitioners, v. COLORADO PUBLIC INTEREST RESEARCH GROUP, INC., et al. Respondents.	No. 74-1270

BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI ON BEHALF OF BOSTON EDISON COMPANY, CAROLINA POWER & LIGHT COMPANY, CENTRAL MAINE POWER COMPANY, COMMONWEALTH EDISON COMPANY, THE CONNECTICUT LIGHT AND POWER COMPANY, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., THE DETROIT EDISON COMPANY, THE HARTFORD ELECTRIC LIGHT COMPANY, ILLINOIS POWER COMPANY, MAINE YANKEE ATOMIC POWER COMPANY, NEW ENGLAND POWER COMPANY, NIAGARA-MOHAWK POWER CORPORATION, NORTHEAST NUCLEAR ENERGY COMPANY, NORTHERN STATES POWER COMPANY, OMAHA PUBLIC POWER DISTRICT, POWER AUTHORITY OF THE STATE OF NEW YORK, PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, ROCHESTER GAS & ELECTRIC CORPORATION, SOUTHERN CALIFORNIA EDISON COMPANY, UNION ELECTRIC COMPANY, VERMONT YANKEE NUCLEAR POWER CORPORATION, WESTERN MASSACHUSETTS ELECTRIC COMPANY, WISCONSIN ELECTRIC POWER COMPANY AND YANKEE ATOMIC ELECTRIC COMPANY

INTRODUCTION

Boston Edison Company, Carolina Power & Light Company, Central Maine Power Company, Commonwealth Edison Company, The Connecticut Light and Power Company, Consolidated Edison Company of New York, Inc., The Detroit Edison Company, The Hartford Electric Light Company, Illinois Power Company, Maine

Yankee Atomic Power Company, New England Power Company, Niagara-Mohawk Power Corporation, Northeast Nuclear Energy Company, Northern States Power Company, Omaha Public Power District, Power Authority of the State of New York, Public Service Company of New Hampshire, Rochester Gas & Electric Corporation, Southern California Edison Company, Union Electric Company, Vermont Yankee Nuclear Power Corporation, Western Massachusetts Electric Company, Wisconsin Electric Power Company and Yankee Atomic Electric Company ("Utilities"), as *amici curiae* herein, support the petition for a writ of certiorari which was filed in this matter by the Solicitor General on behalf of the Environmental Protection Agency and its Administrator ("EPA"), with the concurrence of the Nuclear Regulatory Commission ("NRC").[1]

INTEREST OF UTILITIES

Each of the Utilities holds an interest in one or more nuclear power plants for which construction permits or operating licenses have been issued or applications are pending before the NRC.[2] Utilities are, therefore, heavily involved in providing electricity to their customers by means of nuclear energy and have spent billions of dollars and will be required to spend further billions of dollars

[1]Pursuant to Energy Reorganization Act of 1974, 88 Stat. 1233, 42 U.S.C.A. § 5841 (f) (Supp. Feb., 1975), the NRC succeeded to the regulatory functions of the Atomic Energy Commission. See p. 7, *infra*.

[2]The number of customers served by Utilities, the number and capacity of the nuclear facilities to which Utilities are committed, the percentage of Utilities' capacity served by nuclear power plants and the anticipated service dates of units presently uncompleted are set forth in Appendix A.

pursuant to that commitment.[3] They have a special interest here because the immediate effect of the Tenth Circuit Opinion will be the severe disruption of the process for licensing these plants. Utilities, unlike EPA, have actual experience with the complexity of regulating nuclear wastes and with the burdens inherent in multilayered regulation.

The opinion of the Tenth Circuit may seriously affect the continued operation and scheduled construction of nuclear power plants by imposing redundant and potentially conflicting regulation by the EPA pursuant to the Federal Water Pollution Control Act Amendments of 1972 ("FWPCA"), 86 Stat. 816, 33 U.S.C. §§1251 *et seq.* (Supp. II, 1972). NRC currently regulates all aspects of liquid nuclear waste material discharges based upon evaluations of their effects on the environment and public health and safety. Because of the sophisticated technology involved, such regulation requires in-depth consideration of the design and operation of nuclear power plants. Indeed, since reducing liquid nuclear wastes generally increases nuclear waste discharges in either airborne or solid form, which are also regulated by the NRC, overlapping regulation of such wastes by EPA may conflict with NRC policies in these related areas or prevent the design of nuclear power plants which are acceptable to both agencies. The delay in obtaining permits or permit renewals and other consequences to Utilities' operations which are threatened by the Tenth Circuit Opinion are wholly inconsistent with the obligation

[3]A new two-unit nuclear generating station may cost substantially in excess of one billion dollars.

of Utilities to serve their customers and the declared national policy of conserving fossil fuel resources and developing energy sources not dependent upon foreign governments. The additional layers of regulation which will flow from the Tenth Circuit decision are inconsistent with the expressed intent of Congress and provide no benefits to the public to offset these excessive social and economic costs.

REGULATIONS AND STATUTES INVOLVED

In addition to the regulations and statutes quoted in the Petition, Section 101(f) of the Federal Water Pollution Control Act, 86 Stat. 816, 33 U.S.C. §1251(f) (Supp. II, 1972), is pertinent to the issues herein. That section provides:

> (f) It is the national policy that to the maximum extent possible the procedures utilized for implementing this chapter shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government.

QUESTIONS PRESENTED

1. Whether duplicate regulation of the discharge of liquid nuclear wastes by EPA is required by the FWPCA in light of the NRC's unique and comprehensive responsibility for regulating such discharges.

2. Whether the inevitable disparities in the interpretation of EPA standards with respect to liquid nuclear wastes, which will result if the states are granted the regulatory roles that are generally contemplated by the FWPCA, would be inconsistent with the overall Congressional purpose of maintaining pervasive, unified, federal control over those aspects of the design and operation of nuclear

power plants which could pose a radiological hazard to the health and safety of the public.

REASONS THE WRIT SHOULD BE GRANTED

1. The opinion of the Tenth Circuit poses an important question involving the accommodation of the statutory charters for two major federal agencies and their respective roles in regulating nuclear power plants. The Tenth Circuit, construing the FWPCA, held that there is concurrent jurisdiction over the discharge of liquid nuclear wastes from nuclear power plants by EPA and NRC. This conclusion, based solely on the court's reading of the definition of "pollutant" contained in the FWPCA, flies in the face of a consistent Congressional policy, expressed in legislative enactments both prior and subsequent to the FWPCA, which is premised on the NRC and its predecessor agency having sole regulatory authority over such discharges and is inconsistent with the legislative history of the FWPCA itself.

The Atomic Energy Act of 1954, 68 Stat. 919, as amended, 42 U.S.C. §§2011 *et seq.* (1970), vests in the NRC the authority and responsibility to administer a pervasive and unified program for the regulation of radioactive discharges to both air and water from production and utilization facilities.[4] The development of that legislation through successive amendments was described in *Northern States Power Co.* v. *Minnesota*, 447 F.2d 1143

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[4]As the opinion of the Tenth Circuit recognized, the liquid nuclear wastes from nuclear power plants are source, by-product or special nuclear materials and nuclear power plants are production and utilization facilities within the meaning of those terms in the Atomic Energy Act of 1954, 68 Stat. 919, as amended, 42 U.S.C. §2014 (e), (z), (aa) (1970).

(8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972). There, the Eighth Circuit observed that "Federal regulation over the processing and use of source, by-product and special nuclear material and over production and utilization facilities was insured . . . by means of . . . [the] comprehensive licensing system required by the Act." 447 F.2d at 1148. The court went on to consider whether the Atomic Energy Act permitted state regulation of nuclear wastes. In holding that such regulation was preempted by the Atomic Energy Act, the court referred to "[t]he nature of the subject matter regulated and the need for uniform controls in order to effectuate the objectives of Congress. . . ." *Id.* at 1153. The Eighth Circuit perceived that these objectives were contained in specific findings in the Atomic Energy Act "that the processing and utilization of source, by-product and special nuclear material *must be regulated by the United States in the national interest. . . .*" *Id.* (emphasis in original). To this end, Congress enacted "a regulatory scheme which is virtually unique in the degree to which broad responsibility is reposed in the administering agency". *Siegel* v. *Atomic Energy Comm'n*, 400 F.2d 778, 783 (D.C. Cir. 1968); *see* also *Union of Concerned Scientists* v. *Atomic Energy Comm'n*, 499 F.2d 1069 (D.C. Cir. 1974). During the enactment of the FWPCA Congress specifically refused to adopt an amendment which would have reversed the *Northern States* decision.[5] This "unique" scope of regulatory authority, bottomed on specific Congressional findings regarding the necessity for exclusive, unified federal control of, *inter alia*, nuclear power plants, has been drastically altered by the decision of the court below.

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[5]See Note 15 of Solicitor General's Brief.

Subsequent to the enactment of the FWPCA in 1972, Congress again considered the regulatory responsibilities of the Atomic Energy Commission. The Energy Reorganization Act of 1974, 88 Stat. 1233, 42 U.S.C.A. §§5801 *et seq.* (Supp. Feb., 1975) abolished the Atomic Energy Commission and substituted in its place two agencies, NRC and the Energy Research and Development Administration. One of the express purposes of the legislation was to "upgrade the regulation of nuclear power" S. Rep. No. 93-980, 93d Cong., 2d Sess. 1 (1974). It was anticipated that the NRC would succeed to "all the licensing and related regulatory functions of the AEC." *Id.* at 57. No mention was made by Congress of any concurrent regulatory jurisdiction over liquid nuclear wastes by EPA, even though the FWPCA had been in force for nearly two years and EPA was in the process of issuing effluent guidelines for power plants which did not deal with source, by-product and special nuclear materials after having declared its understanding that such materials were not covered by the FWPCA. 40 C.F.R. §125.1(y) (1974).

The FWPCA must be viewed against the broad sweep of these other legislative enactments. *Morton* v. *Mancari*, 417 U.S. 535, 547-49 (1974); *United States* v. *American Trucking Ass'ns, Inc.*, 310 U.S. 534, 545 (1940). In this context, the Tenth Circuit's myopic interpretation of the reference to "radioactive materials" in the definition of the term "pollutant" in the FWPCA is clearly erroneous.

The Tenth Circuit failed to give adequate consideration to the interaction of the Atomic Energy Act and the FWPCA or the FWPCA's legislative history, in reliance upon the maxim of statutory construction which purportedly bars such aids when the meaning of the statute is

plain. 507 F.2d at 747. This maxim does not suffice to require the birth of a new regulatory structure without reference to the requirements of other statutes. Moreover, the policy of the FWPCA itself prevents such a simplistic use of its terms. Section 101(f) of the FWPCA establishes the national policy of preventing "needless duplication and unnecessary delays" such as would result from the decision of the Tenth Circuit. 86 Stat. 816, 33 U.S.C. §1251(f) (Supp. II, 1972). In view of this mandate and the NRC's regulatory jurisdiction described above, the meaning of the reference to radioactive materials in the FWPCA cannot be considered in the abstract, and the Tenth Circuit clearly erred in rejecting an analysis of the legislative history. This Court has never been so limited. *United States* v. *Dickerson*, 310 U.S. 554, 561-62 (1940); *Boston Sand & Gravel Co.* v. *United States*, 278 U.S. 41, 48 (1928). As set forth in more detail at pages 17 and 18 of the Solicitor General's brief, the legislative history of the FWPCA compels the conclusions that duplication of the NRC's regulatory role was not contemplated and that Congress intended to avoid such wasteful results.[6]

2. Actions by EPA and the states in developing a regulatory system under the Tenth Circuit's decision may seriously erode the holding in *Northern States Power Co.* v. *Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972). Review by this Court is urgently required to prevent this conflct. The *Northern States* de-

[6]*See, e.g.*, 1 Committee Print, A Legislative History of the Water Pollution Control Act Amendments of 1972 Together With A Section-by-Section Index, prepared by the Environmental Policy Division of the Congressional Research Service of the Library of Congress, 93d Cong., 1st Sess., 226, 818 (1973).

cision held that the Atomic Energy Act of 1954 preempted concurrent state regulation of radioactive effluents from nuclear power plants. However, the FWPCA is premised on extensive state participation in the regulatory process and Section 101(b) of the Declaration of Goals and Policy of the FWPCA so states. 86 Stat. 816, 33 U.S.C. §1251(b) (Supp. II, 1972). We do not believe that this policy, or anything else in the FWPCA, empowers the states to set standards of their own for liquid nuclear wastes in complete contradiction to *Northern States, supra.* However, the FWPCA does contain procedures for state implementation of federal standards under which the states may attempt to stake out a role which would leave *Northern States* a mere shell.

To implement the policy of state participation, Congress established a procedural framework calling for state administration in two phases with respect to most pollutants. First, a state in which an industrial facility such as a power plant is located is empowered to grant or deny a certification which is a prerequisite to the issuance of a federal permit for the facility. FWPCA Section 401, 86 Stat. 816, 33 U.S.C. §1341 (Supp. II, 1972). The certification may specify design features and operating restrictions which, in the judgment of the state, will be necessary in order to bring the anticipated discharge into compliance with applicable federal standards established in accordance with the FWPCA. Such certification is prospective and is based on the state's analysis of the proposed design and operation of the power plant. The certification procedure necessarily entails broad discretion on the part of the certifying state. These determinations of compliance with standards and requirements promul-

gated by, *inter alia*, EPA, create the opportunity for 50 different interpretations of the applicable federal standards. This important potential for diversity is further magnified by the fact that the certifying state is authorized to prescribe effluent limitations for the permittee which the state, in its discretion, believes are necessary to achieve the standards thus interpreted. Section 401(d), 86 Stat. 816, 33 U.S.C. §1341 (d) (Supp. II, 1972). Thus, if this certification power applies to standards for the discharge of liquid nuclear wastes, uniform regulation would be precluded.

The second phase of state participation further enhances state discretion by adding the authority to issue and enforce permits with respect to liquid discharges from industrial facilities. Section 402(b), 86 Stat. 816, 33 U.S.C. §1342(b) (Supp. II, 1972). In lieu of their certification powers, delegee states will be authorized to exercise the administrative powers of imposing requirements for applications, and to conduct administrative hearing procedures to determine whether an applicant meets applicable standards promulgated by EPA pursuant to the FWPCA. Twenty-one states, including four states who participated as *amicus curiae* below, have received such authority under Section 402(b). Here again, if the Tenth Circuit's decision results in state permit powers, the *Northern States* holding will be eroded.

If a state's determination of whether applicable standards for liquid nuclear waste discharges will be met during future operation of a nuclear power plant involved no more than a simple calculation, it might plausibly be argued that state participation under the FWPCA in certifying compliance with such standards would not pose

a threat of fragmented, uneven regulation. However, since extremely complex engineering assumptions and the interplay of all aspects of the design and operation of the nuclear reactor and its fuel go into the evaluation of the amount of liquid radioactive discharges which will be released from a proposed nuclear power plant, vast divergence in implementation is inevitable. The magnitude of liquid radioactive discharges ultimately emitted is derived from the fission of uranium atoms in the multitudes of fuel rods in the reactor core and from the activation of materials in the reactor cooling water by neutrons released in the fission process. The extent of the radioactivity which builds in the reactor cooling water is dependent upon the extent of leaks in the fuel rods, the chemistry of the reactor cooling water and the manner of plant operation. Estimates of the level of radioactivity which will occur in the reactor cooling water vary greatly due to these factors. Before any of the materials in the reactor water are released, they must either be removed from the reactor cooling water by clean-up systems or leak, in minute quantities, from valves and equipment within the nuclear power plant. Thus, estimating the quantities of radioactivity which may be found at any point in a nuclear power plant requires complete understanding of the operation of all of the fluid systems in the nuclear power plant and of the equipment comprising those systems. Finally, the collected wastes are treated by numerous types of equipment. Thus, release estimates are further dependent upon performance estimates for the treatment equipment. The NRC has been compelled to engage in extremely complex calculations in order to determine whether proposed nuclear

power plants are likely to comply with its regulations concerning the discharge of liquid nuclear wastes.[7]

Since determinations of the compliance of nuclear power plants with NRC standards are so complex, the opportunities for confusion and variation in state certification of compliance with standards set initially by EPA for such discharges are manifest. Indeed, a state might attempt to ban nuclear power plants entirely, based on its assumptions regarding fuel performance and plant operation on the ground that no combination of available equipment provides, in its view, adequate assurance that the FWPCA standards will be met. Therefore, the legislative goal of unified, comprehensive regulation of nuclear facilities may well be beyond reach, unless the decision of the Tenth Circuit is reversed. At the very least, a long

[7]The complexity of estimating discharges of liquid radioactive wastes is exemplified by the proceeding presently pending before the NRC with respect to Proposed Appendix I to 10 C.F.R. Pt. 50, 36 Fed Reg. 11113 (1971). In that proceeding, the NRC and its predecessor agency have attempted to adopt numerical guides for releases of radioactive materials based upon the "as low as practicable" concept found in 10 C.F.R. §50.34a. The proceeding was commenced on June 9, 1971. Numerous days of hearings have been held and multi-volume draft and final environmental impact statements have been issued, but a decision has not been reached. The NRC Staff, in its concluding statement in the Appendix I proceeding, found necessary both the allowance of margin for exceeding the applicable guide and the issuance of proposed supplemental "Regulatory Guides" including two which relate to the calculation of liquid and gaseous nuclear waste discharges. These guides are each in excess of 150 pages in length and contain assumptions to be made and analytical procedures to be used in determining whether a particular plant will comply with the proposed regulation, as well as related computer listings. Concluding Statement of the Regulatory Staff, No. RM-50-2 (A.E.C., Feb. 20, 1974).

regulatory hiatus will occur while standards for liquid nuclear wastes are developed and the hundreds of applications for the necessary permits are processed, all to the detriment of the goals of providing reliable electric service, conserving alternative fossil fuels and decreasing dependence on foreign fuel supplies.

3. The consequences which flow from the decision of the Tenth Circuit are without any discernable countervailing benefit. The NRC has developed comprehensive regulations requiring evaluation of the effect of the discharge of nuclear wastes on both the environment and the health and safety of the public. Such evaluations are a part of the matrix of NRC regulation of nuclear facilities.[8] These regulations are implemented in detail in operating licenses issued by the NRC for nuclear power plants. In recognition of technological advances, including those pertinent to liquid nuclear waste releases, the NRC has required adherence to increasingly stringent standards. Moreover, since EPA has unquestioned authority to establish standards for acceptable levels of radiation in the total environment, but not to establish standards for the discharge of nuclear wastes from individual nuclear power plants, there is adequate provision for its contribution to the overall regulatory process without its specific regulation of liquid radioactive discharges. Reorganization Plan No. 3 of 1970, 84 Stat. 2086, 42 U.S.C. §4321 (1970), which established EPA, transferred to that agency:

> The functions of the Atomic Energy Commission under the Atomic Energy Act of 1954 as amended, administered through its Division of Radiation Pro-

[8]See 10 C.F.R. Pt. 50 including appendices; see particularly 10 C.F.R. §§50.34–.36a (1974).

tection Standards, to the extent that such functions of the Commission consist of establishing generally applicable environmental standards for the protection of the general environment from radioactive material.

The Atomic Energy Commission, in recognition of EPA's authority has agreed to "take appropriate action to assure that AEC-licensed facilities are operated in such a manner that routine radioactive discharges therefrom do not exceed generally applicable environmental standards established by EPA. . . ." AEC-EPA Memorandum of Understanding with Respect to AEC-Licensed Facilities, 38 Fed. Reg. 24936 (Sept. 11, 1973).[9] Accordingly, duplication of the NRC's role by EPA and the states as required by the Tenth Circuit's decision would add nothing to the protection of the environment or the public.

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[9] *See also* Memorandum of Understanding with Respect to AEC Facilities, 38 Fed. Reg. 32965 (Nov. 29, 1973); Office of Management and Budget Memorandum to EPA and AEC, December 7, 1973.

CONCLUSION

For the foregoing reasons, Utilities submit that the opinion below contravenes the clear Congressional intent to avoid duplicate regulation and that the Court should issue a writ of certiorari to the Tenth Circuit.

Respectfully submitted,

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April 18, 1975

APPENDIX A

A-1

Utility	Customers in Service Territory[1]	Current % of Generating Capacity Which Utilizes Nuclear Energy	% of Generating Capacity Which Will Utilize Nuclear Energy in 1985
Boston Edison Company.....	594,000	22	38
Carolina Power & Light Company.....	648,000	11.8	50
Commonwealth Edison Company.....	2,729,000	33	43

A-2

Number and Capacity of Nuclear Plants With Operating Licenses[2]		Number, Capacity and Anticipated Service Date of Nuclear Plants Which Have Construction Permits or Are the Subject of Construction Permit Applications[2]		
Plant	Kilowatts Electrical (in thousands)	Plant	Kilowatts Electrical (in thousands)	Date
Pilgrim 1	670	Pilgrim 2	1180	1982
Yankee Rowe	175			
Connecticut Yankee	575			
H. B. Robinson 2	665	Brunswick 1	821	1976
Brunswick 2	821	Harris 1	900	1981
		Harris 2	900	1982
		Harris 3	900	1983
		Harris 4	900	1984
Dresden 1	200	LaSalle 1	1078	1978
Dresden 2	800	LaSalle 2	1078	1979
Dresden 3	800	Byron 1	1120	1980
Quad Cities 1	800	Byron 2	1120	1981
Quad Cities 2	800	Braidwood 1	1120	1982
Zion 1	1040	Braidwood 2	1120	1982
Zion 2	1040			

Utility	Customers in Service Territory[1]	Current % of Generating Capacity Which Utilizes Nuclear Energy	% of Generating Capacity Which Will Utilize Nuclear Energy in 1985	Number and Capacity of Nuclear Plants With Operating Licenses[2]		Number, Capacity and Anticipated Service Date of Nuclear Plants Which Have Construction Permits or Are the Subject of Construction Permit Applications[2]		
				Plant	Kilowatts Electrical (in thousands)	Plant	Kilowatts Electrical (in thousands)	Date
Consolidated Edison Company of New York, Inc.	2,800,000	10.8	19.3[3]	Indian Point 1 Indian Point 2	257 864	Indian Point 3	873	1976
The Detroit Edison Company.	1,651,402	0	26.5	—		Fermi 2 Greenwood 2 Greenwood 3	1150 1207 1207	1980–1981 1984 1986
Illinois Power Company.....	471,490	0	37	—		Clinton 1 Clinton 2	950 950	1981 1983
Niagara-Mohawk Power Corporation.....	1,278,000	9	18	Nine Mile Point 1	610	Nine Mile Point 2	1100	1982
Northern States Power Company.....	948,192	31.2	28.4	Monticello 1 Prairie Island 1 Prairie Island 2	538 520 520	Tyrone 1	1150	1985

Utility	Customers in Service Territory[1]	Current % of Generating Capacity Which Utilizes Nuclear Energy	% of Generating Capacity Which Will Utilize Nuclear Energy in 1985
Omaha Public Power District.	192,766	32.2	51.5
Power Authority of the State of New York.....	50[4]	16	31[3]
Rochester Gas & Electric Corporation.....	272,195	47	54
Southern California Edison Company.....	2,700,000	3	12
Union Electric Company.....	905,000	0	21
Wisconsin Electric Power Company.....	731,834	27	33.3

Number and Capacity of Nuclear Plants With Operating Licenses[2]		Number, Capacity and Anticipated Service Date of Nuclear Plants Which Have Construction Permits or Are the Subject of Construction Permit Applications[2]		
Plant	Kilowatts Electrical (in thousands)	Plant	Kilowatts Electrical (in thousands)	Date
Ft. Calhoun 1	455	Ft. Calhoun 2	1150	1983
Fitzpatrick	821	Greene County	1300	1982–1983
Ginna 1	470	Sterling	1150	1982
San Onofre 1	430	San Onofre 2	1100	1980
		San Onofre 3	1100	1981
—		Callaway 1	1150	1981
		Callaway 2	1150	1983
Pt. Beach 1	485	Koshkonong 1	900	1983
Pt. Beach 2	485	Koshkonong 2	900	1984

Utility	Customers in Service Territory[1]	Current % of Generating Capacity Which Utilizes Nuclear Energy	% of Generating Capacity Which Will Utilize Nuclear Energy in 1985
The New England area:[5]			
Central Maine Power Company	340,000	31	39
The Connecticut Light and Power Company	536,000	21	40
The Hartford Electric Light Company	282,000	21	40
Maine Yankee Atomic Power Company			
New England Power Company	44[4]	8.7	37
Northeast Nuclear Energy Company			
Public Service Company of New Hampshire	250,000	9.2	57.2
Vermont Yankee Nuclear Power Corporation			
Western Massachusetts Electric Company	161,000	21	40
Yankee Atomic Electric Company			

Number and Capacity of Nuclear Plants With Operating Licenses[3]		Number, Capacity and Anticipated Service Date of Nuclear Plants Which Have Construction Permits or Are the Subject of Construction Permit Applications[3]		
Plant	Kilowatts Electrical (in thousands)	Plant	Kilowatts Electrical (in thousands)	Date
Yankee Rowe	175	Millstone 2	830	1975
Vermont Yankee	540	Millstone 3	1,150	1979
Connecticut Yankee	575	Montague 1	1,150	1986
Millstone 1	660	Montague 2	1,150	1988
Maine Yankee	855	Pilgrim 2	1,180	1982
		Seabrooke 1	1,150	1980
		Seabrooke 2	1,150	1982

Footnotes to Appendix A

[1]The population served by each utility is a considerably larger number. For example, the population in the service territory of Commonwealth Edison Company is approximately 8,000,000.

[2]Some of the nuclear plants listed are partially owned by other companies.

[3]This number includes Indian Point 3.

[4]These companies are wholesalers of power.

[5]The Northeast Nuclear Energy Company, Maine Yankee Atomic Power Company, Vermont Yankee Nuclear Power Corporation and Yankee Atomic Electric Company are generating companies which construct and operate nuclear power plants for some of the other utilities listed in this group. One or more of the companies in this group has an interest in each of the plants listed.

Supreme Court, U. S.
FILED
JUL 7 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1270

RUSSELL TRAIN, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Petitioners

—*v.*—

COLORADO PUBLIC INTEREST RESEARCH GROUP, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 8, 1975
CERTIORARI GRANTED JUNE 2, 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1270

RUSSELL TRAIN, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Petitioners

—*v.*—

COLORADO PUBLIC INTEREST RESEARCH GROUP, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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[1] The judgment and opinion entered December 9, 1974, in the court of appeals are printed as Appendices A and B to the petition for certiorari.

[2] The opinion issued February 15, 1974, by the district court is printed as Appendix C to the petition for certiorari.

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Plaintiffs' motion for judgment on the pleadings or, in the alternative, summary judgment filed January 31, 1974 17

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MISCELLANEOUS

"Fact sheets" issued by Permits Branch, Enforcement Division, Denver Regional Office, Environmental Protection Agency [Ex. A and B to plaintiffs' memorandum in support of motion for judgment on the pleadings, filed in district court January 31, 1974] 21

DOCKET ENTRIES

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 74-1154

DATE	FILINGS—PROCEEDINGS
3/26/74	Cause docketed; docketing statement
3/28/74	Appearance—Appellant—Kurtz-Phelan
3/29/74	Appearance—Appellant—Engdahl
3/29/74	Appearance—Appellant—Mastbaum
4/5/74	Record on appeal, Vol. I (pleadings)
4/8/74	Appearance—appellee—Johnson, Clark & Snel Order—assigned to Calendar B; appellant's brief due 4/29/74—Lewis
4/29/74	Motion of Minnesota Pollution Control Agency for leave to join in the *Amicus Curiae* brief of the State of Minnesota
	Brief of the State of Minnesota as amicus curiae—Joint brief of the Minnesota Pollution Control Agency as amicus curiae—To panel on 5/10/74 Filed 5/29/74
	Brief of the States of Arkansas, Kansas, Michigan, Commonwealth of Pennsylvania and State of Washington as amici curiae
	Statement of Considerations (Environmental Radiation Standards for the Uranium Fuel Cycle)
	Public Law 92-500, 92nd Congress, S. 2770, 10-18-72
	History of the Water Pollution Control Act Amendments of 1974—Vol I
	History of the Water Pollution Control Act Amendments of 1974—Vol. II
	Federal Register, Tuesday, May 22, 1973, Vol. 38, No. 98, Part III

DATE	FILINGS—PROCEEDINGS

Brief of the appellants

Record on Appeal, Vol. I

5/6/74 Appearances—For Amicus-Michigan—Kelley, Kutinsky, Freeman

5/13/74 Appearance—For Amicus-Washington—Roe

5/10/74 Appearance — For Amicus-Arkansas — Tucker, Frawley

5/16/74 Appearance—For Amicus-Pa.—Eichbaum

5/24/74 Motion—Appellee's req. to ext. time to 6/3/74 to file brief

5/24/74 Order: Appellee (USA) granted to 6/3/74 to file brief

5/29/74 Order: Minn. Polution Control Agency granted leave to file an amicus curiae brief and join in the brief of the State of Minn. (Lewis, McWilliams, Doyle) (brief filed as of this date)

6/5/74 Appellee's preliminary brief

6/13/74 Appellee's brief

6/17/74 Appellants' Reply Brief

7/10/74 Appellants' motion to expedite the hearing and disposition of case

7/25/74 Order. Upon consideration of appellants' motion to expedite hearing and disposition of this case, the motion is GRANTED. (Lewis, McWilliams)

7/30/74 Set for Hearing—September 1974 Term of Court

8/15/74 Appearance—amicus curiae (St. of Minn.)—Spannaus, Sipkins and Kaul

9/12/74—Letter-motion by U.S. requesting leave of Court to complete argument early—0 & 3cc—(To Panel)

DATE	FILINGS—PROCEEDINGS

9/13/74 Argued and submitted—Holloway, McWilliams, Christensen

12/9/74 Opinion—Holloway, *McWilliams*, Christensen (Publish)
Judgment: Reversed and remanded for further proceedings.

12/23/74 Appellant's letter citation
Appellant's bill of costs
Appellant's motion for attorneys fees
Appellant's memorandum in support of appellants' motion for attorneys fees—to panel

12/31/74 Mandate only to Clerk

1/3/75 Appellees' motion to file out of time opposition to appellants' motion for attorneys' fees (To Panel)
Appellees' opposition to appellants motion for attorneys' fees and appellees' motion for leave to file responsive brief by January 20, 1975 (To Panel)

1/8/85 Order: Appellees' motion for leave to file its opposition to Appellants' motion for attorneys' fees is *granted.* Appellants motion for award of attorneys' fees is *denied* but denial of the motion is without prejudice to Appellants' right to reassert the motion for allowance of fees to the trial court—this Court being of the opinion that the matter should first be presented to the trial court for a ruling. (Holloway, McWilliams, Christensen)

1/17/75 Receipt for mandate.

1/27/75 O-ROA to District Court.

1/31/75 Receipt for O-ROA

4/15/75 Supreme Court notice of filing petition for certiorari in No. 74-1270 on 4/8/75.

6/9/75 Supreme Court certificate evidencing granting of certiorari in No. 74-1270 on 6/2/75

DOCKET ENTRIES

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

No. C-5438

DATE	PROCEEDINGS
1973	
10/15	COMPLAINT FOR DECLARATORY JUDGMENT AND FOR INJUNCTIVE RELIEF Summons Issued
10/19	Return of U. S. Marshals Service by Serving 1 copy Certified Mail #220220, RRR, on Russell Train, Administrator, U.S.E.P.A., Washington, D.C. 10/17/73. Return of U. S. Marshals Service by serving 2 copie Certified Mail #220219, RRR on Attorney General, Washington, D.C., and 1 copy of U.S. Attorney, Denver, Colorado for U. S. Environmental Protection Agency, Washington, D.C. 10/17/73.
12/14	MOTION of Defts for Extension of time in which to file a response to the Complaint. . . . Cert. of Service.
12/21	Signed (FMW 12/18/73) ORDER . . . Defts. shall have extension of time in which to file a response to the Complaint unto and including 1/16/74. . .
1974	
1/2	Request of Pltfs. for Production of Documents
1/18	MOTION of Defts. to Dismiss, or in the alternative Summary Judgment. Memorandum in Support of Defts' Motion to Dismiss, or in the alternative, Summary Judgment . . .
1/25	MOTION of Defts. to Stay Discovery or, in the alternative, Motion to Extend the Time within which to respond to Pltf's Request for Production of Documents Memorandum in support of Defts' Motion to Stay or, in the alternative, Motion for an Extension of Time

DATE	PROCEEDINGS
1/31	MOTION of Pltfs. for Judgment on the Pleadings, or in the alternative, Summary Judgment
2/15	HEARING (FMW) Cross Motions for Summary Judgment . . . Arguments . . . Ordered: Pltf's Motion for Summary Judgment is granted . . . The Court will submit a written Findings either later today or Tuesday 2/19/74 . . . Counsel for Pltf argues on application for attorney's fees is denied . . . Recess . . . Signed (FMW) MEMORANDUM OPINION GRANTING SUMMARY JUDGMENT . . . The request for an award of attorneys fees is denied, and summary judgment shall enter against pltfs and in favor of the defts. . . Signed (FMW) JUDGMENT . . . Ordered: the action and complaint are dismissed and the request of counsel for the pltf. for an award of attorneys fees is denied. Further Ordered: the defts shall have their costs upon the filing of a Bill of Costs with the Clerk of this Court . . .
2/25	NOTICE OF APPEAL . . . filed by Pltf.
3/6	Designation of Contents of Record and Statement of Issue on Appeal
4/5	Receipt of U.S.C.A. for record on appeal Volume I
12/31	MANDATE Received . . . Ordered: Judgment is reversed. The cause is remanded to the U. S. District Court for the District of Colorado for further proceedings in accordance with the opinion of this court . . . eod 1/13/75
1975	
1/29	Volume I of the Record on Appeal received.
4/15	Ltr to Hon. Holloway, McWilliams and Christensen . . . from the 10th Cir. Ct. of Appeals A Petition for Writ of Certiorari was filed in the U. S. Supreme Court and given No. 74-1270.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. C-5438

[Filed Oct. 15, 1973, United States District Court,
Denver, Colorado, James R. Manspeaker, Clerk]

COLORADO PUBLIC INTEREST RESEARCH GROUP, INC., a non-profit Colorado Corporation, COLORADO ENVIRONMENTAL LEGAL SERVICES, INC., a non-profit Colorado Corporation, MORGAN SMITH, FRANK ANDERS, A. M. WINCHESTER, and FRANK L. BOULTER, PLAINTIFFS

—*vs*—

RUSSELL TRAIN as Administrator,
United States Environmental Protection Agency,
401 M. St., S.W., Washington, D.C. 20460

and

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
401 M. St., S.W., Washington, D.C. 20460,
DEFENDANTS

COMPLAINT FOR DECLARATORY JUDGMENT AND FOR INJUNCTIVE RELIEF

INTRODUCTION

1. Plaintiffs bring this action against the Administrator of the United States Environmental Protection Agency (hereafter Administrator) and the United States Environmental Protection Agency (hereafter EPA) to compel them to perform their mandatory, non-discretionary duty to regulate all radioactive effluents, including source, by-product, or special nuclear materials as defined by the Atomic Energy Act of 1954, 42 U.S.C. Sec. 2011 *et seq.*, pursuant to the clear and unambiguous language of the Federal Water Pollution Control Act Amendments

of 1972, 33 U.S.C. Sec. 1251 *et seq.* (Supp. 1973), (hereafter the Act). As is fully set out below, defendants have wrongfully failed to regulate all radioactive effluents as required by the Act by excluding certain radioactive effluents from the definition of pollutant by administrative action when both the Act and Regulations clearly define pollutant as including all radioactive materials. This breach of duty by the defendants has left a substantial and dangerous gap in the water quality enforcement program of the EPA and has jeopardized the Act's goals. Plaintiffs seek a declaratory order that all radioactive materials including those which are encompassed within the meaning of source, by-product, or special nuclear materials as defined by the Atomic Energy Act of 1954, are pollutants within the meaning of the Act, and the discharge of all radioactive materials is unlawful except as in compliance with the provisions of the Act. Plaintiffs further seek an order directing the defendants to regulate all radioactive materials pursuant to the clear statutory mandate of the Act.

2. Radioactive effluents are or will be discharged into the waters of Colorado from the Atomic Energy Commission's Rocky Flats Plant located between Boulder, Colorado, and Golden, Colorado, and the Fort St. Vrain Nuclear Generating Station located at Platteville, Colorado.

3. The Rocky Flats Plant is managed for the Atomic Energy Commission by the Dow Chemical Company. The Plant is a plutonium processing facility that handles both plutonium and uranium as well as other potentially hazardous materials. It manufactures components of atomic bombs including parts of nuclear triggers. Radioactive effluents which have been discharged from the plant or are currently being discharged include plutonium—239, americium—241, as well as tritium.

4. The Rocky Flats Plant currently collects semi-monthly water samples from four reservoirs and nine tap water loactions around the Rocky Flats and greater Denver areas for possible radioactive contamination. The reservoirs include: (1) Baseline, whose primary use is a source of irrigation water; (2) Ralston Reservoir, the

water supply for portions of Denver, Arvada, Wheatridge and the Rocky Flats Plant; (3) Great Western Reservoir, which is the Broomfield water supply, and (4) Standley Lake, which serves Westminster and portions of the Thornton-Northglenn Area. Tap or treated water is collected from the surrounding communities of Arvada, Boulder, Broomfield, Denver, Golden, Lafayette, Louisville, Thornton, and Westminster.

5. The Fort St. Vrain Nuclear Generating Station is owned by the Public Service Company of Colorado. The facility is the first commercial-sized, high temperature, gas-cooled nuclear reactor.

6. Defendants have refused to regulate or even consider any matter concerning radioactive effluents from these facilities.

JURISDICTION AND VENUE

7. The jurisdiction of this Court is invoked under 33 U.S.C. Sec. 1365 (a) (2) (Supp. 1973) (Citizen suits against Administrator of the United States Environmental Protection Agency pursuant to 1972 Amendments to the Federal Water Pollution Control Act to compel the performance of an act or duty which is not discretionary under said Act); 5 U.S.C. Secs. 701-706 (Administrative Procedure Act); 28 U.S.C. Sec. 1331 (Federal Question); 28 U.S.C. Secs. 2201-2202 (Declaratory Judgment Act); 28 U.S.C. Sec. 1361 (Action to Compel an officer of the United States to perform his duty). The amount in controversy exceeds $10,000.00, exclusive of interest and costs.

8. Venue of this action is in the United States District Court for the District of Colorado by virtue of 28 U.S.C. Sec. 1391 (e).

PARTIES

9. Plaintiff, Colorado Public Interest Research Group, Inc. (hereafter COPIRG) is a non-profit Colorado Corporation. Its principal office is located in Room 200; 209 16th Street; Denver, Colorado 80202. COPIRG has a statewide membership composed of students at various

colleges and universities in Colorado, dedicated to the promotion of social welfare, including the defense and preservation of the human environment and natural resources of Colorado.

10. COPIRG's members use and depend on the waters of Colorado for water and food supply, transportation and recreation. The quality of these waters directly affects the health, economic, recreational, aesthetic and environmental interests of these individuals.

11. Many of COPIRG's members reside in the County of Weld, State of Colorado, and the County of Boulder, State of Colorado. They are or will be directly affected by the discharge of radioactive effluents into the waters of Colorado from the Rocky Flats Plant and/or the Fort St. Vrain Nuclear Generating Station.

12. Plaintiff, Colorado Environmental Legal Services, Inc. (hereafter CELS), is a non-profit Colorado Corporation. Its principal office is located in Room 200, 209 16th Street, Denver, Colorado 80202. Its membership is composed of law students in the State of Colorado dedicated to the preservation of the environment through legal research, advocacy, educational and informational activities.

13. CELS members use and depend on the waters of Colorado for water and food supply, transportation, and recreation. The quality of these waters directly affects the health, economic, recreational, aesthetic and environmental interests of these individuals.

14. Many of CELS members reside in the Denver Metropolitan a[illegible]a. They are directly affected by the discharge of radioactive effluents into the water of Colorado from the Rocky Flats Plant.

15. Plaintiff Morgan Smith is a resident of Brighton, Colorado, and is a member of the Colorado House of Representatives for the 31st District. He uses and depends on the waters of Colorado for water and food supply, transportation and recreation. The quality of these waters directly affects his health, economic, recreational, aesthetic and environmental interests, as well as those of his constituents in the 31st Legislative District.

16. Plaintiff Smith and his constituents are specifically and directly affected by the discharge of radioactive effluents from the Rocky Flats Plant in that sewage from Broomfield, Colorado, which includes tap water contaminated by radioactive water from the Rocky Flats Plant flows into Big Dry Creek which flows into the 31st Legislative District in Adams County and eventually the South Platte River. Certain of Plaintiff Smith's constituents also receive their drinking water from the Great Western Reservoir which contains radioactive effluents from the Rocky Flats Plant.

17. Plaintiff Frank Anders is a resident of Greeley, Colorado, and a professor at the University of Northern Colorado in Greeley. He uses and depends on the waters of Colorado for water and food supply, transportation and recreation. The quality of these waters directly affects his health, economic, recreational, aesthetic, and environmental interests.

18. Plaintiff Anders is directly affected by the discharge of radioactive effluents into the South Platte River which flows through Greeley. Radioactive effluents from both the Fort St. Vrain Nuclear Generating Station and the Rocky Flats Plant eventually flow into the South Platte.

19. Plaintiff A. M. Winchester is a resident of Greeley, Colorado and a professor at the University of Northern Colorado in Greeley. He uses and depends on the waters of Colorado for water and food supply, transportation, and recreation. The quality of these waters directly affects his health, economic, recreational, aesthetic and environmental interests.

20. Plaintiff Winchester is directly affected by the discharge of radioactive effluents into the South Platte River which flows through Greeley. Radioactive effluents from both the Fort St. Vrain Nuclear Generating Station and the Rocky Flats Plant eventually flow into the South Platte.

21. Plaintiff Frank L. Boulter is a resident of LaSalle, Colorado, and is engaged in the business of farming. His agricultural interests include cattle, alfalfa, and

sorghum and he owns various tracts of land in the Platte Basin. Plaintiff Boulter uses and depends on the waters of Colorado for water and food supply, his livelihood, transportation, and recreation. The quality of these waters greatly affects his health, economic, recreational, aesthetic, and environmental interests.

22. Plaintiff Boulter is directly affected by the discharge of radioactive effluents into the South Platte River which borders his land. Radioactive effluents from both the Fort St. Vrain Nuclear Generating Station and the Rocky Flats Plant eventually flow into the South Platte.

23. All plaintiffs are members of the class of persons whom the Act was intended to benefit and protect. Plaintiffs must depend upon the Administrator and the EPA to protect their interest in clean water, free from radioactive contamination pursuant to the provisions of the Act. The interests of the plaintiffs have been and continue to be adversely affected and aggrieved by the acts of defendants specified herein.

24. Defendant Russell Train is the Administrator of the United States Environmental Protection Agency. The Administrator is charged by 33 U.S.C. Sec. 1251 (d) (Supp. 1973) with administering the Federal Water Pollution Control Act Amendments of 1972, including the publishing and promulgation of guidelines and regulations.

25. Defendant United States Environmental Protection Agency (hereafter EPA) is the federal agency administered by and responsible to the Administrator. As such, it is responsible for administering the Federal Water Pollution Control Act Amendments of 1972, including the publishing and promulgation of guidelines and regulations.

STATEMENT OF THE CLAIM

26. The Federal Water Pollution Control Act Amendments of 1972 were passed by Congress on October 18, 1972, over the veto of the President. The Act was effec-

tive immediately, 33 U.S.C. Sec. 1251 *et seq.* (Supp. 1973).

27. The Act's "Declaration of Goals and Policy" states in part [33 U.S.C. Sec. 1251 (Supp. 1973)] that:

> (a) The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this Act—"(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985; (2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water, be achieved by July 1, 1983. . . .

28. The Act provides that the discharge of any pollutant by any person is unlawful except as in compliance with certain provisions of the Act, 33 U.S.C. Sec. 1311 (a) (Supp. 1973). 33 U.S.C. Sec. 1342 (a) (1) provides in part that: "[T]he Administrator may . . . issue a permit for the discharge of any pollutant or combination of pollutants, notwithstanding section 1311 (a) of this title."

29. Radioactive effluents are one of the forms of water pollution which the Act has singled out for regulation and eventual elimination. Thus, the term "pollutant" is specifically defined as including "radioactive materials" 33 U.S.C. Sec. 1362 (6) (Supp. 1973). Further, the Act defines "pollution" as "the man-made or man-induced alteration of the . . . radiological integrity of water", 33 U.S.C. Sec. 1362 (19) (Supp. 1973).

30. On May 22, 1973, the Administrator pursuant to 33 U.S.C. Secs. 1342, 1345 (Supp. 1973), issued regulations [38 Fed. Reg. 13, 528,-13, 540 (1973)] for the National Pollutant Discharge Elimination System, 33 U.S.C. Sec. 1392 (Supp. 1973). Section 125.1 (x) [38 Fed. Reg. 13, 529 (1973)] of these regulations, the definitional section provides that:

> The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, *radioactive materials*, heat, wrecked or discharged equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water. It does not mean (1) "sewage from vessels" or (2) water, gas, or other materials which is injected into a well to facilitate production of oil or gas. . . ." [Emphasis added].

31. Section 125.1 (y) of the regulations states [38 Fed. Reg. 13, 530 (1973)] that:

> The term "pollution" means the man-made or man-induced alteration of the chemical, physical, biological and *radiological* integrity of water. [Emphasis added]

32. Although the language of both the Act and the regulations include all radioactive materials as pollutants, the defendants have refused to regulate those radioactive materials encompassed in the definition of source, by-product or special nuclear materials as defined by the Atomic Energy Act of 1954.*

33. The failure of the defendants to regulate all radioactive effluents, as indicated above, will mean that the excluded radioactive materials will not be subjected to the various steps required by the Act leading to the complete elimination of all pollutants from the Nation's navigable waters by 1985.

34. On July 23, 1973, David C. Mastbaum and John I. Taylor, attorneys for plaintiffs, pursuant to 33 U.S.C. Sec. 1365 (b) (2) (Supp. 1973), gave notice by telegram to Robert W. Fri, the then Acting Administrator of the United States Environmental Protection Agency, of their

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* Defendants purports to rely upon portions of the Act's legislative history as contained in a comment in the regulations to exclude such radioactive materials, 38 Fed. Reg. 13, 530 (1973). However, when the entire legislative history is examined, defendants position is in conflict with the great weight of that legislative history.

intention to commence litigation if radioactive materials which are encompassed in the definition of source, by-product or special nuclear materials as defined by the Atomic Energy Act of 1954, were excluded from regulation under the Federal Water Pollution Control Act Amendments of 1972. As of this date, plaintiffs have received no response to the above notice.

35. Plaintiffs have no adequate remedy at law.

RELIEF

WHEREFORE, plaintiffs pray:

1. That this Court declare that all radioactive materials including those encompassed in the definition of source, by-product or special nucelar materials as defined by the Atomic Energy Act of 1954 42 U.S.C. Sec. 2011 *et seq.* are pollutants within the meaning of 33 U.S.C. Sec. 1362 (Supp. 1973).

2. That this Court declare that all radioactive materials being pollutants within the meaning of the Act, the discharge of any such materials by any person is unlawful except as in compliance with the Act 33 U.S.C. Sec. 1311 (a) (Supp. 1973).

3. That this Court order defendants to comply with the 1972 Amendments to the Federal Water Pollution Control Act by regulating the discharge of all radioactive effluents pursuant to the Act 33 U.S.C. Sec. 1311 (a) (Supp. 1973).

4. That this Court award plaintiffs the costs of litigation, including reasonable attorney's fees pursuant to 33 U.S.C. Sec. 1365 (d) (Supp. 1973).

5. That plaintiffs have such other and further relief as this Court may deem just and proper.

/s/ David C. Mastbaum
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Boulder, Colorado 80302
(303) 444-0993

/s/ John I. Taylor
JOHN I. TAYLOR
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/s/ David E. Engdahl
DAVID E. ENGDAHL
4375 Butler Circle
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/s/ James L. Phelan
JAMES L. PHELAN
Room 200
209 - 16th Street
Denver, Colorado 80202
(303) 753-3193
Attorneys for Plaintiffs

October 15, 1973

[CAPTION AND TITLE OMITTED]

MOTION TO DISMISS, OR IN THE ALTERNATIVE SUMMARY JUDGMENT

[Filed in District Court January 18, 1975]

Defendants move this Court, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss the Complaint for failure to state a claim upon which relief can be granted. In the alternative, defendants move this Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment, because there is no genuine issue as to any material fact, and defendants are entitled to judgment as a matter of law.

In support of this motion, the Court respectfully referred to the Memorandum filed herewith.

The defendants respectfully request an oral hearing to be held at the earliest convenience of the Court.

Respectfully submitted,

WALLACE H. JOHNSON
Assistant Attorney General

MARTIN GREEN
Chief, Pollution Control Section

JAMES L. TREECE
United States Attorney

[CAPTION AND TITLE OMITTED]

MOTION FOR JUDGMENT ON THE PLEADINGS, OR IN THE ALTERNATIVE SUMMARY JUDGMENT

[Filed in District Court January 31, 1974]

Plaintiffs move this court pursuant to Rule 12(c) of the Federal Rules of Civil Procedure that judgment be rendered for the plaintiffs herein on the pleadings for the reason that the response of the defendants filed herein shows that the plaintiffs are entitled to judgment as prayed for in the complaint.

In the alternative, plaintiffs move this court pursuant to Rule 56(a) of the Federal Rules of Civil Procedure to enter summary judgment for the plaintiffs on the ground there is no genuine issue as to any material fact, and the plaintiffs are entitled to judgment as a matter of law.

In support of this motion, plaintiffs will submit a memorandum of law within ten days pursuant to Rule 6 of the Local Rules of Practice of the United States District Court for the District of Colorado.

Plaintiffs respectfully request an oral hearing to be held at the earliest convenience of this court.

Respectfully submitted,

David C. Mastbaum
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(303) 534-5237

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James L. Phelan
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Denver, Colorado 80202
(303) 753-3193
Attorneys for Plaintiffs

January 30, 1974

[CAPTION AND TITLE OMITTED]

JUDGMENT

[Entered in District Court February 15, 1975]

Pursuant to and in accordance with the Memorandum Opinion Granting Summary Judgment signed and filed by the Honorable Fred M. Winner on the 15th day of February, 1974, it is hereby

ORDERED ADJUDGED and DECREED that the action and complaint herein be and are hereby dismissed and that the request of counsel for the plaintiff for an award of attorneys fees is denied.

IT IS FURTHER ORDERED that the defendants shall have their costs upon the filing of a Bill of Costs with the Clerk of this Court.

DATED AT Denver, Colorado this 15th day of February, 1974.

BY THE COURT

/s/ Fred M. Winner
FRED M. WINNER
Judge
United States District Court

[CAPTION AND TITLE OMITTED]

NOTICE OF APPEAL

[Filed in District Court February 25, 1974]

Notice is hereby given that Colorado Public Interest Research Group, Inc., Colorado Environmental Legal Services, Inc., Morgan Smith, Frank Anders, A. M. Winchester, and Frank L. Boulter, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Tenth Circuit from the final judgment granting defendants' motion for Summary Judgment and dismissing the action and complaint and denying plaintiffs the award of attorneys fees in this action on the 15th day of February, 1974.

Respectfully submitted,

/s/ David C. Mastbaum
David C. Mastbaum
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(303) 892-9900

/s/ David E. Engdahl
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/s/ James L. Kurtz-Phelan
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[EXHIBITS ATTACHED TO PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS FILED IN DISTRICT COURT JANUARY 31, 1974]

[EXHIBIT A]

U.S. ENVIRONMENTAL PROTECTION AGENCY
PERMITS BRANCH, ENFORCEMENT DIVISION
1860 LINCOLN ST., DENVER, COLO. 80203
303+837-3874

FACT SHEET

FACT SHEET RELATIVE TO APPLICATION FOR NPDES PERMIT TO DISCHARGE LIQUID EFFLUENT.

APPLICANT NAME:	Public Service Company Fort St. Vrain Nuclear Generating Station
ADDRESS:	P. O. Box 840 Denver, Colorado 80201
TELEPHONE NUMBER:	303+297-7475
APPLICATION NUMBER:	CO-2SB-OXT-2-000078
PUBLIC NOTICE NUMBER:	CO-73-003

The Public Service Company of Colorado has applied for a permit for its Fort St. Vrain Nuclear Generating Station, P.O. Box 361, Platteville, Colorado, 80651, to discharge liquid effluents.

Applicant is a producer of electric power. The application includes one discrete discharge which consists of blowdown from the circulating water cooling tower and the service water cooling tower, and other minor miscellaneous plant discharges. The discharge is to the South Platte River via the Goosequill Ditch, Jay Thomas Ditch and through the large pond commonly referred to as the Farm Pond. Goosequill Ditch is an unclassified waterway regulated by the basic standards applicable to the State of Colorado. These standards require equiva-

lent secondary treatment with disinfection; no floating or settleable materials which may cause degradation of water quality or aesthetics; and no high temperatures, toxic substances or radioactivity. The South Platte River at the point of confluence with the Goosequill Ditch is classified for industrial and irrigation uses. A more complete description of the discharge and a sketch of their location follows below.

Tentative determinations have been made by the EPA staff in cooperation with the State of Colorado relative to effluent limitations and other conditions to be imposed on the permit. These limitations and conditions will assure that State Water Quality Standards will be protected. The permit conditions are also designed to preclude the discharge of liquid radioactive wastes. Public comments are hereby invited any time prior to May 14, 1973. Comments may be directed to the U.S. Environmental Protection Agency, Enforcement Division, 1860 Lincoln Street, Denver, Colorado 80203—Attention: Permits Branch.

WRITTEN COMMENTS. Interested persons are invited to submit written comments on the proposed discharges and the EPA Regional Administrator's proposed determinations. Comments should be submitted by May 14, 1973, either in person or by mail to: U.S. Environmental Protection Agency, Enforcement Division, 1860 Lincoln Street, Denver, Colorado 80203—Attention: Permits Branch.

The application number should appear next to the above address on the envelope and on the first page of any submitted comments. All comments received by May 14, 1973, will be considered in the formulation of final determinations. If no written objections are received, the EPA Regional Administrator will issue his final determinations no later than 60 days following the date of this notice.

INFORMATION AND COPYING. Persons wishing further information may write to the above address, or call the Permits Branch Office at 303+837-3874. Copies of the application, proposed permit including proposed effluent limitations and special conditions, com-

ments received and other documents (other than those which the EPA Regional Administrator maintains as confidential) are available at the Permits Branch Office for inspection and copying. A copying machine is available for public use at a charge of $0.10 per copy sheet.

REGISTER OF INTERESTED PERSONS. Any person interested in a particular application or group of applications may leave his name, address, and telephone number as part of the file for an application. The list of names will be maintained as a means for persons with an interest in an application to contact others with similar interests.

PUBLIC MEETINGS. If submitted comments indicate significant public interest in the application or if it is believed that useful information may be produced thereby, the Regional Administrator, at his discretion, may hold a public meeting on the application. Any person may request the Regional Administrator to hold a public meeting on an application.

Public notice of a meeting will be published and circulated at least 30 days in advance of the meeting. The meeting will be held in the vicinity of the discharge. The Regional Administrator will provide final determinations within 20 days of the date of the public meeting.

Further information relative to the procedures and nature of public meetings concerning discharge permits may be obtained by calling 303+837-3874 or by writing to the U.S. Environmental Protection Agency, Enforcement Division, 1860 Lincoln Street, Denver, Colorado 80203—Attention: Permits Branch.

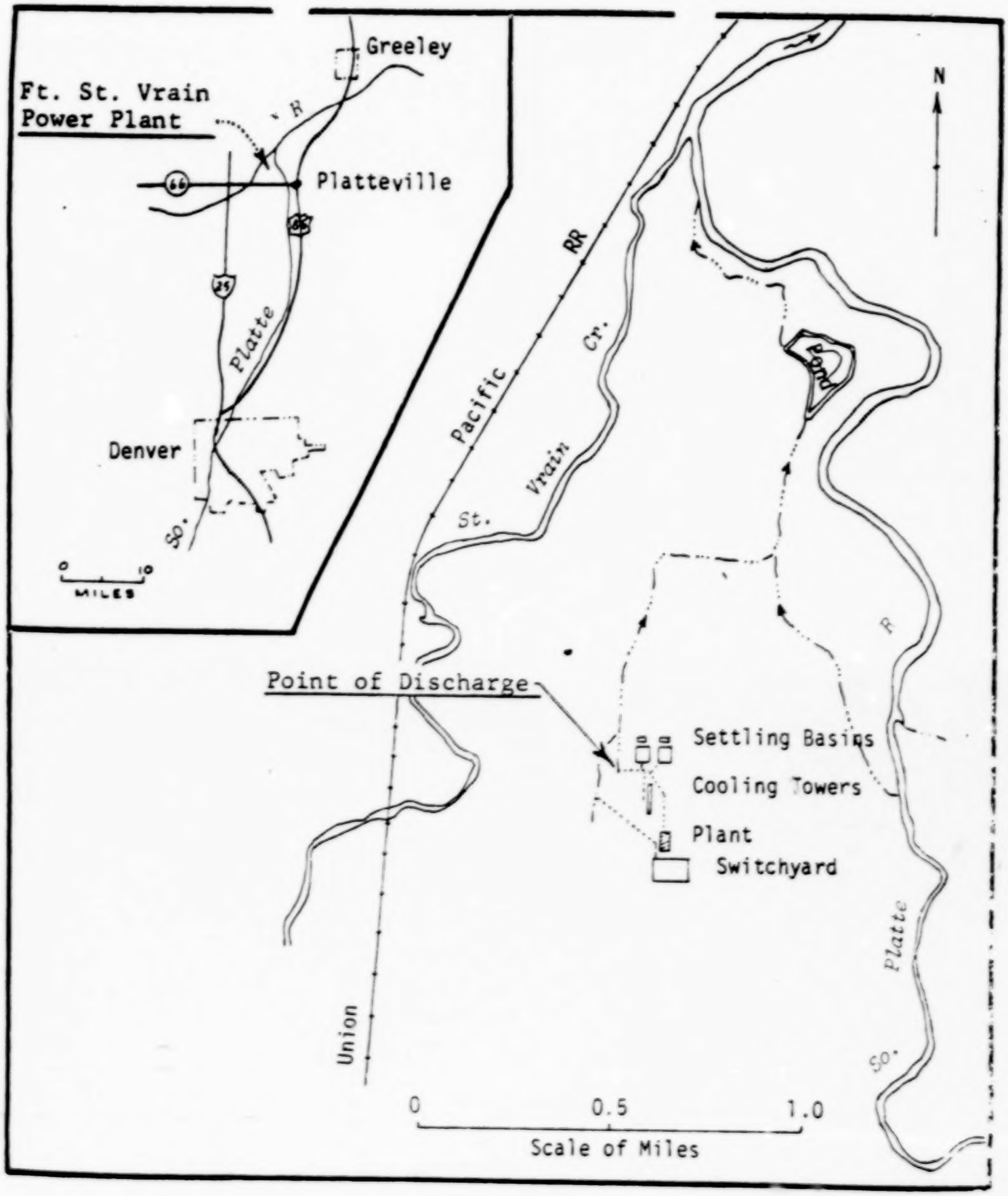
DESCRIPTION OF DISCHARGES

PUBLIC SERVICE COMPANY OF COLORADO
FORT ST. VRAIN NUCLEAR GENERATING STATION

001. (The plant is not yet operational and, therefore, all effluent information is obtained from design calculations.) This discharge will contain all liquid effluents that are to be discharged from the plant. The majority of the discharge will consist of blowdown from the main circulating water cooling tower. Smaller portions of the discharge are from the service water cooling tower, package sewage treatment plant, turbine building sump, and essential plant drains.

The average flow will be approximately three million gpd. The effluent will normally contain all the constituents present in the plant intake (South Platte River water, St. Vrain Creek water, and shallow wells furnish makeup water) at about 2.5 times each concentration.

The temperature of the flow leaving the farm pond should be less than 80°F. The pH range will be 7.0-8.0. The most significant parameter, total dissolved solids will average around 2100 mg/1 with a 2300 mg/1 maximum.



LOCATION OF FORT ST. VRAIN POWER PLANT
PUBLIC SERVICE CO. OF COLORADO
PLATTEVILLE, COLORADO

FINAL TECHNICAL DRAFT OF SPECIAL CONDITIONS FOR DISCHARGE PERMIT

Applicant: Public Service Company—Ft. St. Vrain
Application Number: CO-2SB-OXT-2-000078

1. Operation of Facilities

The permittee is authorized to discharge to the South Platte River through discharge point 001 as described and spatially located in the permit application, an effluent, the quality of which shall not deteriorate below the quality stated in these conditions.

Discharge 001 shall be directed into Goosequill Ditch, and subsequently into the Jay Thomas Ditch, and then into the large pond commonly referred to as the "Farm Pond".

No water associated with the regeneration of demineralizers shall be added to discharge 001 with the exception of final rinse water with a conductivity of less than 300 micromhas per cm.

The permittee shall collect and treat all waste flows from the plant site and discharge them in such a manner as to maximize removal of pollutants from each discharge stream. If present, cooling water shall be collected and treated in such a manner as to achieve the effluent limitations in Section (2) before being discharged into the receiving water.

2. Effluent Limitations

Effective immediately upon issuance of this permit the following limitations (subject to precision and accuracy limitations inherent in the analytical procedures) for the below specified parameters in discharge 001 shall not be exceeded.

Discharge 001

Parameter	Concentration	Total Pounds Per Day	Instantaneous Discharge Rate (Pounds/Day)
pH	6.0-9.0 (gross)[a]		
Total Dissolved Solids	2300 mg/1 (gross)[a]		
Total Suspended Solids	30 mg/1 (gross)[b,c]	none (net)[c]	none (net)[c]
Ammonia Nitrogen		none (net)[d]	none (net)[d]
Chlorine Residual	0.1 mg/1 (gross)[e,e]		
Temperature	(gross)[f]		

[a] Any single analysis and/or measurement beyond this limitation shall be considered a violation of the conditions of this permit.

[b] This limitation shall be determined by the analysis of a properly preserved composite sample composed of a minimum of four (4) grab samples collected at two (2) hour intervals. At no time shall any single analysis and/or measurement be greater than 150 percent of the limitation (1.5 times the limitation).

[c] Subject to precision and accuracy limitations inherent in the analytical procedures, there shall be no increase in the total pounds of Total Suspended Solids discharged over that amount of Total Suspended Solids contained in the inlet makeup water to the cooling towers. The limit of 30 mg/1 shall be met when the circulating water cooling tower is not in operation. This limitation does not apply during times of precipitation if normal surface runoff is entering the discharge.

[d] Subject to precision and accuracy limitations inherent in the analytical procedures, there shall be no increase in the total pounds of ammonia discharged over that amount of ammonia contained in the inlet makeup water to the cooling towers.

[e] This parameter shall be measured in Goosequill Ditch as it enters the Jay Thomas Ditch. This limitation shall be in effect after the first 120 days of commercial operation. A concentration of 0.5 mg/1 shall be allowed for the first 120 days following the start of commercial operation.

[f] This parameter shall be measured at the discharge from the Farm Pond. If, because of atmospheric conditions, the Farm Pond discharge temperature exceeds 80° F, blowdown shall be discharged from the cold side of the circulating water cooling tower.

Limitations in this Section are related to engineering design information. If actual operation reveals inadequacies in this information resulting in violations of the effluent limitations which are due solely to these inadequacies, an implementation schedule shall be established which will achieve the required limitations, should that be environmentally necessary, and it shall become a part of this permit.

For those parameters not covered above, no deterioration beyond effluent quality as shown in the permit application will be allowed.

3. Control of Liquid Radioactive Wastes

The permittee shall study the quantity and strength of liquid radioactive wastes generated within the plant during the twelve (12) month period following the date commercial operation commences. This date shall be considered as the first day the plant is complete, licensed, tested, and has satisfactorily completed the 72-hour demonstration run. This investigation shall be primarily directed toward finding the optimal method of disposal of those wastes which will result in no liquid discharge of radioactivity originating within the plant. Results of this study shall be reported to the Environmental Protection Agency and the State of Colorado within this twelve (12) month period. A compliance schedule for implementing the optimal method of disposal will be established at that time and shall become a part of this permit, subject to review and approval by the Atomic Energy Comimssion pursuant to its authority under the Atomic Energy Act of 1954, as amended. The selected disposal method shall allow no discharge of liquid waste containing radioactivity originating from within the plant unless it has been clearly shown that such a discharge will be less deleterious to the environment than other forms of disposal and unless specific written approval has been obtained from the Environmental Protection Agency and the State of Colorado.

The permittee shall, during the initial twelve (12) month period, minimize the discharge of liquid radioactivity that is generated within the plant. At all times,

all applicable radiation standards, including local, State and Federal regulations shall be met.

4. Basis for Effluent Limitation Calculations

Limitations stated in Section (2) with the notation "net" are calculated on the basis of the net increase of each individual parameter over the quantity of that same parameter present in the intake water. Intake water shall be the water from the South Platte River, St. Vrain Creek and all other sources and measured at the intake into the cooling towers prior to any contamination or use in the process of this facility. Any contaminants contained in any intake water obtained from underground wells shall not be adjusted for as described above and therefore shall be considered as process input to final effluent.

Limitations stated in Section (2) with the notation "gross" are calculated on the basis of gross measurements of each parameter in the designated discharge irrespective of the quantity or quality of those parameters in the intake waters.

5. Batch Discharges

Batch or slug discharges shall be considered a violation of the conditions of this permit, unless prior written approval is received for such manner of discharging from the Regional Administrator of the Environmental Protection Agency. For purposes of this permit, a batch or slug discharge shall be defined as the discharge of any parameter in an amount greater than 150 percent of any limitation shown in Section (2) (1.5 times the limitation).

6. Monitoring Requirements

a. Data Collection

Effective upon receipt of this permit the permittee shall monitor and record, at the frequency and in the manner indicated below, the following parameters associated with the applicable discharge(s). Sample collection, treatment, and preservation shall be in accord with the best methods technologically feasible and shall be in a manner acceptable to the Regional Administrator

of the Environmental Protection Agency or his designated representative. (Consult the Region VIII Treatment and Preservation Guide for basic considerations.)

Analytical and sampling methods utilized by the permittee shall conform to those designated in one of the following references (latest edition) or equivalent methods approved by the Regional Administrator or his designated representative:

(1) *Standard Methods for the Examination of Water and Waste Waters*, Thirteenth Edition. American Public Health Association (New York, New York, 10019), 1971.

(2) *A.S.T.M. Standards*, Part 23, Water: Atmospheric Analysis. American Society for Testing and Materials (Philadelphia, Pennsylvania, 19103), 1970.

(3) *W.Q.O. Methods for Chemical Analysis of Water and Wastes.* Environmental Protection Agency, Water Quality Office, Analytical Quality Control Laboratory (1014 Broadway, Cincinnati, Ohio, 45202), April 1971. PREFERRED.

The permittee must be able to show proof at the request of the Regional Administrator of the Environmental Protection Agency of the accuracy of any flow-measuring device used in obtaining data submitted in the monitoring report. The flow-measuring device must indicate values within 10% of the actual flow being measured.

b. Monitoring Program

At a minimum the following parameters shall be monitored at the frequency and with the type of measurement indicated:

Discharge 001 is to be sampled in Goosequill Ditch at the first point common to all discharges and prior to any dilution or contamination with agricultural waters. Exceptions to this are chlorine residual which is to be measured in the Goosequill Ditch at the Jay Thomas Ditch, and temperature which is to be measured at the overflow from the Farm Pond.

Discharge 001

Parameter-Units	Frequency	Type of Measurement
Flow—mgd	Weekly	Grab
pH—units	Weekly	Grab
Total Dissolved Solids-mg/1	Weekly	8-hour composite
Total Suspended Solids-mg/1	Weekly	8-hour composite
Ammonia Nitrogen—mg/1	Weekly	8-hour composite
Chlorine Residual—mg/1	Weekly	Grab
Temperature—°F	Weekly	Grab
Radiation—See (6) (f)		

A grab sample may be substituted for a composite sample if it has been determined to be equally representative of water quality.

Intake water is to be sampled at the inlet to the cooling towers according to the following schedule; this monitoring may be omitted if the permittee wishes to disclaim the "net" allowance described in Section (4).

Intake

Parameter-Units	Frequency	Type of Measurement
Ammonia Nitrogen—mg/1	Weekly	8-hour composite
Total Suspended Solids-mg/1	Weekly	8-hour composite

A grab sample may be substituted for a composite sample if it has been determined to be equally representative of water quality.

Special Consideration:

If intake water is being supplemented by underground well water, and "net" values are applicable for certain parameters, the well water pumpage rate shall be reported at the same frequency as required for other flow measurements.

c. Records and Reports

The permittee shall record for all samples, the type of sample, date and time of sampling, the analytical

technique used, the date and time analyses were performed, name of person performing analyses, and the results of all analyses. Instrument charts, records of analyses and records of maintenance and/or calibration of instruments shall be retained by the permittee for a minimum of three (3) years and shall be available for inspection in the offices of the permittee's facility. The record retention period may be extended at the direction of the Regional Administrator of the Environmental Protection Agency, and also must be retained during the course of any period of unresolved litigation.

Results shall be reported at quarterly intervals and shall be postmarked by the 15th of the month following the end of the reporting period. The first report shall be submitted for the period ending ————————. Submitted reports shall include the above data.

Reports are to be submitted under the signature of the authorized signing official or his authorized agent, so authorized by letter of delegation.

Send reports to:

(1) U.S. Environmental Protection Agency
Suite 900, 1860 Lincoln Street
Denver, Colorado 80203
Attention: Permits Branch

(2) Colorado Department of Health
Division of Water Pollution Control
4210 East 11th Avenue
Denver, Colorado 80220

d. Alteration of Monitoring

The sampling frequency, sampling point location(s), parameters measured, and reporting procedures will be periodically reviewed by the Environmental Protection Agency and are subject to modification during the period in which this permit is in effect.

e. Other Considerations

Any modifications in water use, waste collection, treatment and disposal facilities; changes in operational pro-

cedures; elimination of discharge; or other significant activities which alter the nature and/or frequency of the discharge(s) or otherwise affect the conditions of this permit, should be enumerated in a written report accompanying the first monitoring report following any of the above alterations.

f. Radiation Monitoring

The permittee shall transmit along with the monitoring report, a duplicate copy of the reports on radioactive liquid discharges required to be submitted to the Atomic Energy Commission and/or the State of Colorado.

7. Unusual Discharge Provisions

a. Oil and Hazardous Material

The permittee shall within 60 days after the issuance of this permit submit an acceptable oil and hazardous material spill prevention and containment plan. Adequacy will be determined by the Environmental Protection Agency. Adequate plans shall include information and procedures relative to the prevention of spills and unplanned discharges of oil and hazardous substances including but not limited to the following:

(1) a brief description of recent spills as they relate to subsequent changes which mitigate against recurrence;
(2) a description of the reporting system which will be used to alert responsible facility management and appropriate legal authorities;
(3) a description of preventative facilities (including overall facility plot) which prevent, contain or treat spills and unplanned discharges;
(4) a list of all oil and hazardous materials used, processed, or stored at the facility which represent a potential spill threat to surface waters;
(5) implementation schedule for additional facilities which might be required in (3) above, but which are not yet operational;

(6) a list of available outside contractors, agencies or other bodies which could be utilized in the event of a spill;
(7) provision for periodic review and updating of the contingency plan.

It shall be a violation of this permit if oil and hazardous material containment and prevention procedures are not implemented as specified above.

The foregoing provisions shall in no way render inapplicable those requirements imposed by Section 311 of the Federal Water Pollution Control Act Amendments of 1972, and regulations promulgated thereunder.

b. Accidental Discharge

The permittee shall immediately notify the Environmental Protection Agency and the State of Colorado by telephone and in writing of any accidental discharge or any other discharge or action or omission which will tend to violate the conditions of this permit. Failure to provide such notification may result in immediate revocation of this permit. Within 15 days of the issuance of the permit, the permittee shall file a statement with the Environmental Protection Agency and the State of Colorado which shall contain the names of the person or persons who are designated to report conditions as noted in this Section as well as Section (9), which will tend to violate permit conditions. In the event of such a condition, the above-named person will report the following information as well as all other pertinent information:

(1) The cause of the accidental or irregular condition.
(2) The anticipated amount of time the discharge or condition is expected to continue or the length of time it did continue if it has been corrected prior to notification.
(3) The contents of the accidental or irregular discharge.
(4) Steps which will be and have been taken by the permittee to mitigate any effect of the irregu-

lar discharge or condition on the receiving water.

(5) The anticipated effect on the receiving water.

(6) Any measures that might be necessary for downstream users to take in order to protect their interests.

(7) What additional monitoring and recording activity is being conducted.

(8) Steps that will be taken to prevent recurrence of the abnormal condition.

Compliance with the provisions of this Subsection shall in no way provide the permittee with immunity from prosecution for violations of the terms of this permit pursuant to Section 309 of the Federal Water Pollution Control Act Amendments of 1972.

8. Solids Disposal

Effluent screenings, sludges or other solid wastes shall not be discharged into the receiving water or tributaries and shall not be disposed of in such a manner as to allow their entry into receiving waters or their tributaries.

9. Oil Discharge

Oil and grease are not to be discharged in any quantities that are harmful as defined pursuant to 40 CFR 110 or any modification thereto for the duration of this permit.

10. Reporting Responsibility

All data and reports shall be subject to Title 18, Section 1001 of the U. S. Code and Section 309 (c) (2) of the Federal Water Pollution Control Act Amendments of 1972, which relate to the making of fraudulent and incorrect statements.

11. Modifications of Effluent Requirements

Modifications in water quality standards and/or the definition of best practical control technology during the duration of this permit may require modifications in effluent requirements and/or additional effluent requirements. These changes will be incorporated in any reissu-

ance of this permit as necessary to achieve compliance with the revised definition of best practical control technology and/or modified water quality standards prior to July 1, 1977.

12. Permit Duration and Reapplication

This permit will be in effect for a period of time up and until May 1, 1978. If the permittee desires to continue to discharge, he shall reapply 180 days before this permit expires on the application forms then in use.

APPLICABLE EFFLUENT LIMITATIONS AND WATER QUALITY STANDARDS

1. Effluent limitations for the demineralizer regenerant, total dissolved solids, ammonia, total suspended solids and pH reflect this Agency's present concept of best practicable treatment for such plants.
2. The present water quality standards list industrial and agricultural uses. All effluent limits are designed to meet existing water quality standards as well as possible upgraded water quality standards to cover a warm water fishery.
3. The temperature limit reflects approximate maximum atmospheric equilibrium temperature which for the mode of discharge will approximate best available treatment.
4. Effluent restrictions and proposed plans concerning liquid radioactive wastes will reflect best available treatment for a new technology.

[EXHIBIT B]

U.S. ENVIRONMENTAL PROTECTION AGENCY
PERMITS BRANCH, ENFORCEMENT DIVISION
1860 LINCOLN ST., DENVER, COLO. 80203
303+837-3874

FACT SHEET

FACT SHEET RELATIVE TO APPLICATION FOR NPDES PERMIT TO DISCHARGE LIQUID EFFLUENT.

APPLICANT NAME: Public Service Company
Fort St. Vrain Nuclear Generating Station

ADDRESS: P. O. Box 840
Denver, Colorado 80201

TELEPHONE NUMBER: 303+297-7475

APPLICATION NUMBER: CO-2SB-OXT-2000078

PUBLIC NOTICE NUMBER: CO-73-003

The Public Service Company of Colorado has applied for a permit for its Fort St. Vrain Nuclear Generating Station, P.O. Box 361, Platteville, Colorado, 80651, to discharge liquid effluents.

Applicant is a producer of electric power. The application includes one discrete discharge which consists of blowdown from the circulating water cooling tower and the service water cooling tower, and other minor miscellaneous plant discharges. The discharge is to the South Platte River via the Goosequill Ditch, Jay Thomas Ditch and through the large pond commonly referred to as the Farm Pond. Goosequill Ditch is an unclassified waterway regulated by the basic standards applicable to the State of Colorado. These standards require equivalent secondary treatment with disinfection; no floating or settleable materials which may cause degradation of water quality or aesthetics; and no high temperatures,

toxic substances [or radioactivity.] The South Platte River at the point of confluence with the Goosequill Ditch is classified for industrial and irrigation uses. A more complete description of the discharge and a sketch of their location follows below.

Tentative determinations have been made by the EPA staff in cooperation with the State of Colorado relative to effluent limitations and other conditions to be imposed on the permit. These limitations and conditions will assure that State Water Quality Standards will be protected. [The permit conditions are also designed to preclude the discharge of liquid radioactive wastes.] Public comments are hereby invited any time prior to May 14, 1973. Comments may be directed to the U.S. Environmental Protection Agency, Enforcement Division, 1860 Lincoln Street, Denver, Colorado 80203—Attention: Permits Branch.

WRITTEN COMMENTS. Interested persons are invited to submit written comments on the proposed discharges and the EPA Regional Administrator's proposed determinations. Comments should be submitted by May 14, 1973, either in person or by mail to: U.S. Environmental Protection Agency, Enforcement Division, 1860 Lincoln Street, Denver, Colorado 80203—Attention: Permits Branch.

The application number should appear next to the above address on the envelope and on the first page of any submitted comments. All comments received by May 14, 1973, will be considered in the formulation of final determinations. If no written objections are received, the EPA Regional Administrator will issue his final determinations no later than 60 days following the date of this notice.

INFORMATION AND COPYING. Persons wishing further information may write to the above address, or call the Permits Branch Office at 303+837-3874. Copies of the application, proposed permit including proposed effluent limitations and special conditions, comments received and other documents (other than those which the EPA Regional Administrator maintains as confidential) are available at the Permits Branch Office for inspection

and copying. A copying machine is available for public use at a charge of $0.10 per copy sheet.

REGISTER OF INTERESTED PERSONS. Any person interested in a particular application or group of applications may leave his name, address, and telephone number as part of the file for an application. The list of names will be maintained as a means for persons with an interest in an application to contact others with similar interests.

PUBLIC MEETINGS. If submitted comments indicate significant public interest in the application or if it is believed that useful information may be produced thereby, the Regional Administrator, at his discretion, may hold a public meeting on the application. Any person may request the Regional Administrator to hold a public meeting on an application.

Public notice of a meeting will be published and circulated at least 30 days in advance of the meeting. The meeting will be held in the vicinity of the discharge. The Regional Administrator will provide final determinations within 20 days of the date of the public meeting.

Further information relative to the procedures and nature of public meetings concerning discharge permits may be obtained by calling 303+837-3874 or by writing to the U.S. Environmental Protection Agency, Enforcement Division, 1860 Lincoln Street, Denver, Colorado 80203—Attention: Permits Branch.

DESCRIPTION OF DISCHARGES

Public Service Company of Colorado
Fort St. Vrain Nuclear Generating Station

001. (The plant is not yet operational and, therefore, all effluent information is obtained from design calculations.) This discharge will contain all liquid effluents that are to be discharged from the plant. The majority of the discharge will consist of blowdown from the main circulating water cooling tower. Smaller portions of the discharge are from the service water cooling tower, package sewage treatment plant, turbine building sump, and essential plant drains.

The average flow will be approximately three million gpd. The effluent will normally contain all the constituents present in the plant intake (South Platte River water, St. Vrain Creek water, and shallow wells furnish makeup water) at about 2.5 times each concentration.

The temperature of the flow leaving the farm pond should be less than 80°F. The pH range will be 7.0-8.0. The most significant parameter, total dissolved solids will average around 2100 mg/1 with a 2300 mg/1 maximum.

[Map identical to that on p. 25, *supra*, deleted]

General Conditions

1. All discharges authorized herein shall be consistent with the terms and conditions of this permit; facility expansions, production increases, or process modifications which result in new or increased discharges of pollutants must be reported by submission of a new NPDES application or, if such new or increased discharge does not violate the effluent limitations specified in this permit, by submission to the Regional Administrator of notice of such new or increased discharges of pollutants; the discharge of any pollutant more frequently than or at a level in excess of that identified and authorized by this permit shall constitute a violation of the terms and conditions of this permit.

2. After notice and opportunity for a hearing, this permit may be modified, suspended, or revoked in whole

or in part during its term for cause including, but not limited to, the following:

a. Violation of any terms or conditions of this permit;

b. Obtaining this permit by misrepresentation or failure to disclose fully all relevant facts;

c. A change in any condition that requires either a temporary or permanent reduction or elimination of the authorized discharge.

3. Notwithstanding (2) above, if a toxic effluent standard or prohibition (including any schedule of compliance specified in such effluent standard or prohibition) is established under Section 307(a) of the Act for a toxic pollutant which is present in the discharge authorized herein and such standard or prohibition is more stringent than any limitation upon such pollutant in this permit, the Regional Administrator shall revise or modify this permit in accordance with the toxic effluent standard or prohibition and so notify the permittee.

4. The permittee shall allow the Director of the Division of Water Pollution Control, the Regional Administrator, and/or their authorized representatives, upon the presentation of credentials:

a. To enter upon the permittee's premises where an effluent source is located or in which any records are required to be kept under the terms and conditions of this permit;

b. To have access to and copy any records required to be kept under the terms and conditions of this permit;

c. To inspect any monitoring equipment or monitoring method required in this permit; or,

d. To sample any discharge of pollutants.

5. The permittee shall at all times maintain in good working order and operate as efficiently as possible all treatment or control facilities or systems installed or used by the permittee to achieve compliance with the terms and conditions of this permit.

6. The issuance of this permit does not convey any property rights in either real or personal property, or any exclusive privileges, nor does it authorize any injury to private property or any invasion of personal rights,

nor any infringement of Federal, State or local laws or regulations.

7. This permit does not authorize or approve the construction of any onshore or offshore physical structures or facilities or the undertaking of any work in any navigable waters.

FINAL TECHNICAL DRAFT OF SPECIAL CONDITIONS FOR DISCHARGE PERMIT

Applicant: Public Service Company—Ft. St. Vrain

Application Number: CO-2SB-2-000078

1. Operation of Facilities

The permittee is authorized to discharge to the South Plattee River through discharge point 001 as described and spatially located in the permit application, affluent, the quality of which shall not deteriorate below the quality stated in these conditions.

Discharge 001 shall be directed into Goosequill Ditch, and subsequently into the Jay Thomas Ditch, and then into the large pond commonly referred to as the "Farm Pond".

No water associated with the regeneration of demineralizers shall be added to discharge 001 with the exception of final rinse water with a conductivity of less than 300 micromhas per cm.

The permittee shall collect and treat all waste flows from the plant site and discharge them in such a manner as to maximize removal of pollutants from each discharge stream. If present, cooling water shall be collected and treated in such a manner as to achieve the effluent limitations in Section (2) before being discharged into the receiving water.

2. Effluent Limitations

Effective immediately upon issuance of this permit the following limitations (subject to precision and accuracy limitations inherent in the analytical procedures) for the below specified parameters in discharge 001 shall not be exceeded.

Discharge 001

Parameter	Concentration	Total Pounds Per Day	Instantaneous Discharge Rate (Pounds/Day)
pH	6.0-9.0(gross)[a]		
Total Dissolved Solids	2300 mg/1(gross)[a]		
Total Suspended Solids	30 mg/1(gross)[bc]	none(net)[c]	none(net)[c]
Ammonia Nitrogen		none(net)[d]	none(net)[d]
Chlorine Residual	0.1 mg/1(gross)[ae]		
Temperature	(gross)[f]		

[a] Any single analysis and/or measurement beyond this limitation shall be considered a violation of the conditions of this permit.

[b] This limitation shall be determined by the analysis of a properly preserved composite sample composed of a minimum of four (4) grab samples collected at two (2) hour intervals. At no time shall any single analysis and/or measurement be greater than 150 percent of the limitation (1.5 times the limitation).

[c] Subject to precision and accuracy limitations inherent in the analytical procedures, there shall be no increase in the total pounds of Total Suspended Solids discharged over that amount of Total Suspended Solids contained in the inlet makeup water to the cooling towers. The limit of 30 mg/1 shall be met when the circulating water cooling tower is not in operation. This limitation does not apply during times of precipitation if normal surface runoff is entering the discharge.

[d] Subject to precision and accuracy limitations inherent in the analytical procedures, there shall be no increase in the total pounds of ammonia discharged over that amount of ammonia contained in the inlet makeup water to the cooling towers.

[e] This parameter shall be measured in Goosequill Ditch as it enters the Jay Thomas Ditch. This limitation shall be in effect after the first 120 days of commercial operation. A concentration of 0.5 mg/1 shall be allowed for the first 120 days following the start of commercial operation.

[f] This parameter shall be measured at the discharge from the Farm Pond. If, because of atmospheric conditions, the Farm Pond discharge temperature exceeds 80° F, blowdown shall be discharged from the cold side of the circulating water cooling tower.

Limitations in this Section are related to engineering design information. If actual operation reveals inadequacies in this information resulting in violations of the effluent limitations which are due solely to these inadequacies, an implementation schedule shall be established which will achieve the required limitations, should that be environmentally necessary, and it shall become a part of this permit.

For those parameters not covered above, no deterioration beyond effluent quality as shown in the permit application will be allowed.

3. Basis for Effluent Limitation Calculations

Limitations stated in Section (2) with the notation "net" are calculated on the basis of the net increase of each individual parameter over the quantity of that same parameter present in the intake water. Intake water shall be the water from the South Platte River, St. Vrain Creek and all other sources and measured at the intake into the cooling towers prior to any contamination or use in the process of this facility. Any contaminants contained in any intake water obtained from underground wells shall not be adjusted for as described above and therefore shall be considered as process input to the final effluent.

Limitations stated in Section (2) with the notation "gross" are calculated on the basis of gross measurements of each parameter in the designated discharge irrespective of the quantity or quality of those parameters in the intake waters.

4. Batch Discharges

Batch or slug discharges shall be considered a violation of the conditions of this permit, unless prior written approval is received for such manner of discharging from the Regional Administrator of the Environmental Protection Agency. For purposes of this permit, a batch or slug discharge shall be defined as the discharge of any parameter in an amount greater than 150 percent of any limitation shown in Section (2) (1.5 times the limitation).

5. Monitoring Requirements

a. Data Collection

Effective upon receipt of this permit the permittee shall monitor and record, at the frequency and in the manner indicated below, the following parameters associated with the applicable discharge(s). Sample collection, treatment, and preservation shall be in accord with the best methods technologically feasible and shall be in a manner acceptable to the Regional Administrator of the Environmental Protection Agency or his designated representative. (Consult the Region VIII Treatment and Preservation Guide for basic considerations.)

Analytical and sampling methods utilized by the permittee shall conform to those designated in one of the following references (latest edition) or equivalent methods approved by the Regional Administrator or his designated representative:

(1) *Standard Methods for the Examination of Water and Waste Waters,* Thirteenth Edition. American Public Health Association (New York, New York, 10019), 1971.

(2) *A.S.T.M. Standards,* Part 23, Water: Atmospheric Analysis. American Society for Testing and Materials (Philadelphia Pennsylvania, 19103), 1970.

(3) *W.Q.O. Methods for Chemical Analysis of Water and Wastes.* Environmental Protection Agency, Water Quality Office, Analytical Quality Control Laboratory (1014 Broadway, Cincinnati, Ohio, 45202), April 1971. PREFERRED.

The permittee must be able to show proof at the request of the Regional Administrator of the Environmental Protection Agency of the accuracy of any flow-measuring device used in obtaining data submitted in the monitoring report. The flow-measuring device must indicate values within 10% of the actual flow being measured.

b. Monitoring Program

At a minimum the following parameters shall be monitored at the frequency and with the type of measurement indicated:

Discharge 001 is to be sampled in Goosquill Ditch at the first point common to all discharges and prior to any dilution or contamination with agricultural waters. Exceptions to this are chlorine residual which is to be measured in the Goosquill Ditch at the Jay Thomas Ditch, and temperature which is to be measured at the overflow from the Farm Pond.

Discharge 001

Parameter-Units	Frequency	Type of Measurement
Flow—mgd	Weekly	Grab
pH—units	Weekly	Grab
Total Dissolved Solids-mg/1	Weekly	8-hour composite
Total Suspended Solids-mg/1	Weekly	8-hour composite
Ammonia Nitrogen—mg/1	Weekly	8-hour composite
Chlorine Residual—mg/1	Weekly	Grab
Temperature—°F	Weekly	Grab
Radiation—See (5)(f)		

A grab sample may be substituted for a composite sample if it has been determined to be equally representative of water quality.

Intake water is to be sampled at the inlet to the cooling towers according to the following schedule; this monitoring may be omitted if the permittee wishes to disclaim the "net" allowance described in Section (3).

Intake

Parameter-Units	Frequency	Type of Measurement
Ammonia Nitrogen—mg/1	Weekly	8-hour composite
Total Suspended Solids-mg/1	Weekly	8-hour composite

A grab sample may be substituted for a composite sample if it has been determined to be equally representative of water quality.

Special Consideration:

If intake water is being supplemented by underground well water, and "net" values are applicable for certain parameters, the well water pumpage rate shall be reported at the same frequency as required for other flow measurements.

c. Records and Reports

The permittee shall record for all samples, the type of sample, date and time of sampling, the analytical technique used, the date and time analyses were performed, name of person performing analyses, and the results of all analyses. Instrument charts, records of analyses and records of maintenance and/or calibration of instruments shall be retained by the permittee for a minimum of three (3) years and shall be available for inspection in the offices of the permittee's facility. The record retention period may be extended at the direction of the Regional Administrator of the Environmental Protection Agency, and also must be retained during the course of any period of unresolved litigation.

Results shall be reported at quarterly intervals and shall be postmarked by the 15th of the month following the end of the reporting period. The first report shall be submitted for the period ending March 31, 1974. Submitted reports shall include the above data.

Reports are to be submitted under the signature of the authorized signing official or his authorized agent, so authorized by letter of delegation.

Send reports to:

(1) U.S. Environmental Protection Agency
Suite 900, 1860 Lincoln Street
Denver, Colorado 80203
Attention: Permits Branch

(2) Colorado Department of Health
Division of Water Pollution Control
4210 East 11th Avenue
Denver, Colorado 80220

d. Alteration of Monitoring

The sampling frequency, sampling point location(s), parameters measured, and reporting procedures will be periodically reviewed by the Environmental Protection Agency and are subject to modification during the period in which this permit is in effect.

e. Other Considerations

Any modifications in water use, waste collection, treatment and disposal facilities; changes in operational procedures; elimination of discharge; or other significant activities which alter the nature and/or frequency of the discharge(s) or otherwise affect the conditions of this permit, should be enumerated in a written report accompanying the first monitoring report following any of the above alterations.

f. Radiation Monitoring

The permittee shall transmit along with the monitoring report, a duplicate copy of the reports on radioactive liquid discharges required to be submitted to the Atomic Energy Commission and/or the State of Colorado.

6. Unusual Discharge Provisions

a. Oil and Hazardous Material

The permittee shall within 60 days after the issuance of this permit submit an acceptable oil and hazardous material spill prevention and containment plan. Adequacy will be determined by the Environmental Protection Agency. Adequate plans shall include information and procedures relative to the prevention of spills and unplanned discharges of oil and hazardous substances including but not limited to the following:

(1) a brief description of recent spills as they relate to subsequent changes which mitigate against recurrence;

(2) a description of the reporting system which will be used to alert responsible facility management and appropriate legal authorities;
(3) a description of preventative facilities (including overall facility plot) which prevent, contain or treat spills and unplanned discharges;
(4) a list of all oil and hazardous materials used, processed, or stored at the facility which represent a potential spill threat to surface waters;
(5) implementation schedule for additional facilities which might be required in (3) above, but which are not yet operational;
(6) a list of available outside contractors, agencies or other bodies which could be utilized in the event of a spill;
(7) provision for periodic review and updating of the contingency plan.

It shall be a violation of this permit if oil and hazardous material containment and prevention procedures are not implemented as specified above.

The foregoing provisions shall in no way render inapplicable those requirements imposed by Section 311 of the Federal Water Pollution Control Act Amendments of 1972, and regulations promulgated thereunder.

b. Accidental Discharge

The permittee shall immediately notify the Environmental Protection Agency and the State of Colorado by telephone and in writing of any accidential discharge or any other discharge or action or omission which will tend to violate the conditions of this permit. Failure to provide such notification may result in immediate revocation of this permit. Within 15 days of the issuance of the permit, the permittee shall file a statement with the Environmental Protection Agency and the State of Colorado which shall contain the names of the person or persons who are designated to report conditions as noted in this Section as well as Section (8) which will tend to violate permit conditions. In the event of such a condition, the above-named person will

report the following information as well as all other pertinent information:

(1) The cause of the accidental or irregular condition.
(2) The anticipated amount of time the discharge or condition is expected to continue or the length of time it did continue if it has been corrected prior to notification.
(3) The contents of the accidental or irregular discharge.
(4) Steps which will be and have been taken by the permittee to mitigate any effect of the irregular discharge or condition on the receiving water.
(5) The anticipated effect on the receiving water.
(6) Any measures that might be necessary for downstream users to take in order to protect their interests.
(7) What additional monitoring and recording activity is being conducted.
(8) Steps that will be taken to prevent recurrence of the abnormal condition.

Compliance with the provisions of this Subsection shall in no way provide the permittee with immunity from prosecution for violations of the terms of this permit pursuant to Section 309 of the Federal Water Pollution Control Act Amendments of 1972.

7. Solids Disposal

Effluent screenings, sludges or other solid wastes shall not be discharged into the receiving water or tributaries and shall not be disposed of in such a manner as to allow their entry into receiving waters or their tributaries.

8. Oil Discharge

Oil and grease are not to be discharged in any quantities that are harmful as defined pursuant to 40 CFR 110 or any modification thereto for the duration of this permit.

9. Reporting Responsibility

All data and reports shall be subject to Title 18, Section 1001 of the U.S. Code and Section 309(c)(2) of the Federal Water Pollution Control Act Amendments of 1972, which relate to the making of fraudulent and incorrect statements.

10. Modifications of Effluent Requirements

Modifications in water quality standards and/or the definition of best practical control technology during the duration of this permit may require modifications in effluent requirements and/or additional effluent requirements. These changes will be incorporated in any reissuance of this permit as necessary to achieve compliance with the revised definition of best practical control technology and/or modified water quality standards prior to July 1, 1977.

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This permit will be in effect for a period of time up and until May 1, 1978. If the permittee desires to continue to discharge, he shall reapply 180 days before this permit expires on the application forms then in use.

APPLICABLE EFFLUENT LIMITATIONS AND WATER QUALITY STANDARDS

1. Effluent limitations for the demineralizer regenerant, total dissolved solids, ammonia, total suspended solids and pH reflect this Agency's present concept of best practicable treatment for such plants.
2. The present water quality standards list industrial and agricultural uses. All effluent limits are designed to meet existing water quality standards as well as possible upgraded water quality standards to cover a warm water fishery.
3. The temperature limit reflects approximate maximum atmospheric equilibrium temperature which for the mode of discharge will approximate best available treatment.
4. [Effluent restrictions and proposed plans concerning liquid radioactive wastes will reflect best available treatment for a new technology.]

SUPREME COURT OF THE UNITED STATES

No. 74-1270

RUSSELL TRAIN, Administrator of the Environmental Protection Agency, et al., PETITIONERS

v.

COLORADO PUBLIC INTEREST RESEARCH GROUP, INC., et al.

ORDER ALLOWING CERTIORARI. Filed June 2, 1975.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 570073 170

Supreme Court U. S.
FILED
MAY 12 1975
MICHAEL RODAK, JR., CLERK

No. 74-1270

In the
Supreme Court of the United States

OCTOBER TERM, 1974

RUSSELL TRAIN, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
PETITIONERS,

v.

COLORADO PUBLIC INTEREST RESEARCH GROUP, INC., ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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In the
Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1270

RUSSELL TRAIN, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
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RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

STATUTES INVOLVED

33 U.S.C. §1251(a).

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited; . . . .

33 U.S.C. §1311(f).

Notwithstanding any other provisions of this chapter it shall be unlawful to discharge any radiological, chemical, or biological warfare agent or high-level radioactive waste into the navigable waters.

33 U.S.C. §1314(b).

Such regulations shall–

. . . .

(1)(B) specify factors to be taken into account in determining the control measures and practices to be applicable to point sources . . . . Factors relating to the assessment of best practicable control technology currently available . . . . shall include consideration of . . . . non-water quality environmental impact (including energy requirements), ...

(2)(B) Factors relating to the assessment of best available technology shall take into account . . . . non-water quality environmental impact (including energy requirements), ...

33 U.S.C. §1342(d).

(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b) (5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this chapter.

33 U.S.C. §1362. Definitions

* * * *

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

* * * *

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

* * * *

(19) The term "pollution" means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.

33 U.S.C. §1371(2).

Nothing in the National Environmental Policy Act of 1969 shall be deemed to–

(A) authorize any Federal agency authorized to license or permit the conduct of any activity which may

result in the discharge of a pollutant into the navigable waters to review any effluent limitation or other requirement established pursuant to this chapter or the adequacy of any certification under section 1341 of this title; or

(B) authorize any such agency to impose, as a condition precedent to the issuance of any license or permit, any effluent limitation other than any such limitation established pursuant to this chapter.

QUESTION PRESENTED

Whether an isolated piece of the legislative history of the Federal Water Pollution Control Act (FWPCA), taken out of context, provides any basis for granting the nuclear industry an exemption from the comprehensive regulatory scheme established under the FWPCA.

STATEMENT

The court of appeals unanimously held that the discharge of all radioactive effluents, including those from sources covered by licenses issued pursuant to the Atomic Energy Act, 42 U.S.C. §2011, *et. seq.* (AEA), are subject to regulation pursuant to the Federal Water Pollution Control Act, 33 U.S.C. §1251, *et seq.* (Supp. III, 1973). The court's decision was based upon the provision of the FWPCA that specifically includes "radioactive materials," without exception, as a "pollutant" under the FWPCA. 33 U.S.C. §1362(6) (Supp. III, 1973).

The court concluded (Pet. App. 12a) that the plain and obvious meaning of "radioactive materials," when read in the context of other provisions of the FWPCA and the comprehensive, unified system of water pollution control created by the Act (Pet. App. 11a-12a), mandated the inclusion of all "radioactive materials" within the ambit of the FWPCA. The court also held that the "legislative history" relied upon by petitioners is "conflicting and inconclusive" (Pet. App. 12a), and could not be used to change the clear and unambiguous meaning of the statute (Pet. App. 10a).

The decision below invalidated an agreement between the Atomic Energy Commission (AEC) and the Environmental Protection Agency (EPA), 38 Fed. Reg. 24936 (September

11, 1973), whereby EPA relinquished its non-discretionary duty under the FWPCA to regulate all radioactive effluents.

ARGUMENT

The court of appeals correctly held that it was the intent of Congress that all "radioactive materials" discharged into the Nation's waters be regulated pursuant to the comprehensive regulatory scheme established under the FWPCA. Petitioners' challenge to the holding of the court below does not present any issue warranting review by this Court.

1. Petitioners cite (Pet. 17-18) two isolated bits of the legislative history of the FWPCA, which are taken out of context, as the basis upon which this Court should review the decision below. The legislative history relied upon by petitioners is not only misleading, but also is contrary to the weight of the legislative history of the FWPCA which fully supports the holding of the court of appeals. Before discussing the legislative history relied upon by petitioners, however, respondents will show that the other bases of the petition are equally insufficient to grant the petition.

2. Petitioners' primary argument is that the regulation of all "radioactive materials" under the FWPCA will adversely affect the development of the nuclear power industry at the time of an "energy crisis." (pet. 10-16). Whatever merit such policy arguments may have, they are more properly made before the Congress and not before the Court.

This Court has repeatedly held that only Congress can revise the terms of a statute. As was recently stated in *Chemehuevi Tribe of Indians v. Federal Power Commission*. "[w]hatever the merits of the complainants' argument as a matter of policy, it is properly addressed to Congress, not to the courts." 95 S.Ct. 1066, 1082 (1975). *See also Wilderness Society v. Morton*, 479 F.2d 842, 891 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 917 (1973) and *Scenic Hudson Preservation Conference v. Callaway*, 370 F. Supp. 162, 170 (S.D.N.Y. 1973), *aff'd. per curiam*, 499 F.2d 127 (2d Cir. 1974).

This Court should defer to Congress, particularly when to do otherwise would call for a strained interpretation, if not actual rewriting of the statute. Congress recently has adopted

a wide range of laws to lessen the impact of the "energy crisis." This has included efforts to accommodate environmental protection legislation with the national needs for adequate energy supplies.[1]

What petitioners are seeking is an exemption for the nuclear power industry from the comprehensive regulatory scheme of the FWPCA. The creation of such an exemption is for the Congress to decide, not the Court. For this Court to refuse to review the decision below in no way affects Congress' ability to amend the FWPCA or deprives petitioners and other interested parties of the right to seek redress in Congress.[2]

---

[1] *See, e.g.*, Special Energy Research and Development Appropriations Act, 1975, P.L. 93-322, 88 Stat. 276; Energy Supply and Environmental Coordination Act of 1974, P.L. 93-319, 88 Stat. 246; Solar Energy Research, Development and Demonstration Act of 1974, P.L. 93-473, 88 Stat. 1431; Energy Reorganization Act of 1974, P.L. 93-438, 88 Stat. 1233; Federal Energy Administration Act of 1974, P.L. 93-275, 88 Stat. 96; Federal Nonnuclear Energy Research and Development Act of 1974, P.L. 93-577, 88 Stat. 1878; Emergency Petroleum Allocation Act of 1973, P.L. 93-159, 88 Stat. 627; and Emergency Daylight Saving Time Energy Conservation Act of 1973, P.L. 93-182, 87 Stat. 707. *Cf.*, proposed amendments to the Clean Air Act in President Ford's Energy Independence Act of 1975, S-594, introduced on February 5, 1975.

[2] It should be noted that the FWPCA specifically states that energy requirements are to be considered in establishing effluent limitations pursuant to 33 U.S.C. §1314(b)(1)(B) and (2)(B) (Supp. III, 1973). When promulgating standards and regulations concerning radioactive materials, the Environmental Protection Agency (EPA) is required to consider the effect of such standards or regulations on the energy demands of the country. It must be assumed that EPA will use its expertise and that of other federal agencies to establish a regulatory scheme that properly balances energy demands with environmental protection.

3. The FWPCA does not create a redundant, overlapping regulatory scheme. Rather, the Act establishes a comprehensive system to regulate *all* water pollution. The decision below ratified this Congressional purpose.

A. The FWPCA is a systematic and comprehensive statutory scheme designed to restore and maintain our Nation's water resources. 33 U.S.C. §1251(a) (Supp. III, 1973). *See Train v. City of New York*, 95 S.Ct. 839, 841 (1975) and *United States v. Ashland Oil and Transportation Co.*, 504 F.2d 1317, 1324-1325 (6th Cir., 1974). To accomplish these goals, Congress mandated that EPA implement the National Pollutant Discharge Elimination System, under which the Administrator of EPA may issue permits "for the discharge of any pollutant, or combination of pollutants. . . ." 33 U.S.C. §1342 (a)(1) (Supp. III, 1973). The FWPCA makes "the discharge of any pollutant by any person . . . unlawful," 33 U.S.C. §1311(a) (Supp. III, 1973), except in compliance with the statute.

When Congress defined the term "discharge of a pollutant," it indicated the broad scope intended for the Act, at 33 U.S.C. §1362(12) (Supp. III, 1973):

> The term 'discharge of a pollutant' and the term 'discharge of pollutants' each means (A) *any* addition of *any* pollutant to navigable waters from *any* point source, (B) *any* addition of *any* pollutant to the waters of the contiguous zone or the ocean from *any* point source other than a vessel or other floating craft. [Emphasis added.]

The FWPCA establishes a national goal of eliminating by 1985 the discharge of all pollutants. 33 U.S.C. §1251(a)(1) (Supp. III, 1973). The Act defines the term "pollutant" to include, without limitation, "radioactive materials," 33 U.S.C. §1362(6) (Supp. III, 1973). "Pollution" is defined as "the *man-made* or *man-induced* alteration of the chemical, physical, biological, and *radiological* integrity of water." 33 U.S.C. §1362(19) (Supp. III, 1973). [Emphasis added.] Furthermore, the FWPCA provides: "Notwithstanding

any other provision of this chapter it shall be unlawful to discharge *any radiological,* chemical, or biological warfare agent or *high-level radioactive* waste into the navigable waters." 33 U.S.C. §1311(f) (Supp. III, 1973). [Emphasis added.]

The statutory definition of "pollutant" contains only two exceptions. "Pollutant" does not include "sewage from vessels" or "water, gas, or other material which is injected into a well to facilitate production of oil or gas." 33 U.S.C. §1362(6) (A) and (B) (Supp. III, 1973). Neither exception relates in any way to "radioactive materials" or excludes "source material," "byproduct material" or "special nuclear material" as defined by the Atomic Energy Act. (Pet. 7-8, nn. 3-5). As the court below stated, "where a statute contains express exceptions, the courts should be exceedingly slow in implying unexpressed exceptions, lest the courts thereby thwart the legislative intent." (Pet. App. 12a).

B. The intent of Congress to give EPA overall authority to regulate all water pollution can be found in the summary of relevant provisions of the FWPCA, introduced by Senator Muskie, the Act's primary author and sponsor, during Senate consideration of the Conference Committee Report, 1 Leg. Hist. 161, 183.[3] Senator Muskie's discussion of 33 U.S.C. §1371(c)(2) (Supp. III, 1973) indicates his particular concern that the Atomic Energy Commission might attempt to bypass the regulatory scheme of the FWPCA. Senator Muskie's summary states that:

> Section [1371(c)(2)] addresses itself to the authority of Federal licensing and permitting agencies, other than EPA, as relates to effluent limitations and other requirements established

[3] Leg. Hist. refers to Committee Print, A Legislative History of the Water Pollution Control Act Amendments of 1972 Together with a Section-by-Section Index, prepared by the Environmental Policy Division of the Congressional Research Service of the Library of Congress, 93d Cong., 1st Sess. (2 Vols.)

> pursuant to the FWPCA. *EPA is the sole Federal agency specifically charged with comprehensive responsibility to regulate the discharge of pollutants into the waters of the United States, and Section [1371(c)(2)] will ensure that no source of discharge which is in lawful compliance with an effluent limitation established pursuant to the FWPCA will be required to meet a different standard as a condition of a license or permit granted by another Federal agency, such as the Atomic Energy Commission.* [Emphasis added.]

Similarly, in a colloquy between Senators Muskie and Buckley on the floor of the Senate during consideration of the Conference Report, Senator Muskie specifically addressed the question of the supremacy of EPA authority over the AEC with respect to water pollution, at 1 Leg. Hist. 161, 198:

> MR. MUSKIE: Mr. President, I am not sure I heard clearly all of the Senator's question, but if I may try to state it, the Senator is asking whether EPA, in its authority to set effluent limitations controls with respect to the subject matter which the Senator has raised, can set those limitations and whether the AEC has to accept them. The answer is yes.
>
> MR. BUCKLEY: The AEC is precluded from setting higher standards than those imposed by EPA.
>
> MR. MUSKIE: Does the Senator mean more rigorous from an environmental standpoint? I must say that such an action by AEC is not a possibility that occurred to the conferees. It has not occurred to me in my experience over the years. *We considered that this kind of authority should be in EPA and not in AEC,* and in order to put the authority there, we put it in this act, and that is where it is.
>
> MR. BUCKLEY: It is not the intention of the conference committee to exclude the right of other

regulatory bodies to impose more stringent environmental conditions on discharges?

MR. MUSKIE: Again I must say yes, we gave the authority to EPA. *The whole concept of EPA is that environmental considerations are to be determined in one place by an agency whose sole mission is protection of the environment.* It did not occur to us that AEC might be more conscientious in this respect than EPA, so we have given EPA the total authority on the assumption that the risk from AEC was not of the nature described by the Senator but, rather, the opposite, as history demonstrates. [Emphasis added.]

C. In an analogous case, the question of the relationship between a licensing agency (The Federal Power Commission) and the regulatory scheme established under the FWPCA was resolved by the Second Circuit in favor of the comprehensive regulatory system of the FWPCA. *Scenic Hudson Preservation Conference v. Callaway, supra.* The district court opinion, affirmed at 499 F.2d 128, stressed the comprehensive nature of the FWPCA, 370 F. Supp. at 170:

> • • • Con Ed would infer an exception from the [FWPCA] for hydroelectric plants on the theory that Congress could not have intended to interfere with the jursidiction of the FPC in view of the long settled policy, discussed above, of allowing that agency unique control over the production of hydroelectric power. The argument is persuasive at first blush, but even more plausible is plaintiffs' contention that Congress would not design an Act which on its face is all-inclusive, but for specifically enumerated exceptions, and yet intend to establish an unmentioned exception of the scale suggested here. Without any indication that Con Ed's reading of the Congressional will is accurate, the carving out of so major an exception would be improper. If this was Congress' intention and the omission is mere

> oversight, the remedy rests in Congress' hands, and Congress has shown, by its recent amendments to the Alaska pipeline legislation, that it will not hesitate to remove an obstacle to energy production when it believes a change of requirements is necessary in the public interest.

D. The EPA Administrator is required to establish "national standards of performance" for various point sources. 33 U.S.C. §1316 (Supp. III, 1973). The statute enumerates a minimum list of categories of point sources, including, *inter alia,* "steam electric powerplants," 33 U.S.C. §1316(b)(1) (A) (Supp. III, 1973). Some electric powerplants manufacture the steam needed to generate electric power by burning fossil fuels; others manufacture the steam by using the heat generated by nuclear fission in a reactor. Both are "steam electric powerplants," and nothing in §1316 affords any basis whatsoever for claiming that "standards of performance" are to be established for fossil-fuel powerplants but not for nuclear powerplants.[4] The Report of the Senate Committee on Public Works on S.2770, S. Rep. No. 92-414, 92d Cong., 1st Sess., 2 Leg. Hist. 1415, indicates that additional kinds of nuclear facilities are to be added to the list of categories of sources under §1316 by the Administrator as EPA's technical capability increases. Specifically, the Senate Report deals with facilities (which are licensed by AEC) which process irradiated nuclear fuel after its use in reactors, separating wastes for disposal and reclaiming valuable nuclear material for re-use, 2 Leg. Hist. 1477:

> The Committee agreed not to include in its list of new sources nuclear fuels processing plants. The Environmental Protection Agency indicated that the Agency does not have the technical capability to establish controls for such plants at this time. . . . .

---

[4] The decision in *Scenic Hudson Preservation Conference v. Callaway, supra,* and 33 U.S.C. §1316 (Supp. III, 1973) show that Congress intended that water pollution from *all* energy production facilities be regulated pursuant to the FWPCA.

If they do not, such a capability should be developed and this particular source should be added to the list of new sources as soon as possible.

E. The regulatory system established under the FWPCA does not result in needless duplication of regulatory effort; rather, it makes possible collaboration and cooperative application of expertise to abate water pollution. The provision of the FWPCA directed at preventing duplication, 33 U.S.C. §1251(f) (Supp. III, 1973), does not require EPA to restrict its jurisdiction when it coincides with that of other federal agencies. Rather, it is a directive that when agency jurisdictions do overlap the procedures worked out by the agencies should aim at efficiency.

Congress mandated that EPA would be "the sole Federal agency charged with the comprehensive responsibility to regulate the discharge of pollutants into the waters." 1 Leg. Hist. 161, 183. It is clear from the language of the Act that other federal agencies cannot use existing licensure authority, either alone or in conjunction with the National Environmental Policy Act 42 U.S.C. §4321 *et seq.*, to establish effluent limitations which would differ from those established pursuant to the FWPCA. 33 U.S.C. §1371(c)(2) (A) and (B) (Supp. III, 1973). *See also* 1 Leg. Hist. 161, 198.

The legislative history of the FWPCA states that the AEC must defer to the EPA with respect to setting effluent limitations for all pollutants and could not utilize its licensure authority or NEPA to circumscribe the FWPCA. 1 Leg. Hist. 183, 198. See discussion *supra*, pp 8-9. It is in this context that 33 U.S.C. §1371(a) (Supp. III, 1973) relied upon by petitioners (Pet. 17), must be read. The authority of other federal agencies to regulate water pollutants remains intact *only* if it does not conflict with the provisions of the FWPCA. The comprehensive regulatory scheme of the FWPCA takes precedence over the pre-existing authority of any other federal agency such as the Nuclear Regulatory Commission (NRC). *See Scenic Hudson Preservation Conference v. Callaway*, *supra*.

F. Contrary to Petitioners' contention (Pet. 6, 7, 12) that the AEC (NRC) exercises exclusive regulatory control over the nuclear industry, there are several other statutes which, without amending the Atomic Energy Act, vest concurrent jurisdiction over radioactive materials in other federal agencies. For example, while the NRC as successor to the AEC imposes health and safety standards for the packaging and transportation of radioactive materials as part of its power to license nuclear facilities, the transportation and packaging of these very same materials is also regulated with regard to the very same radiation hazards by other federal agencies under the Transportation of Explosives Act, 18 U.S.C. §831-835 (rail and highway); the Dangerous Cargo Act, 46 U.S.C. §170 (water); and the Federal Aviation Act, 49 U.S.C. §§1421, 1430, and 1472(h).

G. For this court to rule that EPA does not have jurisdiction to regulate all radioactive water pollutants, merely because they are also subject to the licensing authority of the NRC, would cast serious doubts on the authority of EPA to regulate any water pollutants which emanate from sources also subject to regulation by other federal agencies. Except for sources specifically exempted in the FWPCA, the EPA regulates water pollution from numerous industries, most of which are subject to the jurisdiction of other federal agencies. There is no reason to treat the nuclear industry differently from any other industrial category by implying an exemption from the FWPCA.

4. Petitioners imply (Pet. 12, 14 n. 15) that the holding below somehow conflicts with the decision in *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1972), *aff'd* 405 U.S. 1035. No such conflict exists.

A. The *Northern States Power Co.* decision was rendered prior to enactment of the FWPCA. At that time, the Atomic Energy Commission exercised exclusive Federal jurisdiction over nuclear wastes. The issue decided by the 8th Circuit was *federal* pre-emption of concurrent *state* regulations. 447 F.2d at 1147. Nothing in the decision below affects this ruling. The EPA is a branch of the federal government, as is the NRC, as successor to the AEC. The *Northern States Power Co.* decision in no way adjudicated the

question of the proper relationship between the EPA and the NRC under the FWPCA.

B. Moreover, even if states do assume authority to regulate radioactive wastes pursuant to the provisions of the FWPCA, such an exercise of authority would not conflict with the *Northern States Power Co.* decision. In the latter case, the states were prohibited from regulating radioactive wastes under their own inherent police powers. Hereafter, however, any state involvement in regulating radioactive wastes will be by virtue of specific congressional authorization through the FWPCA and will be within limitations established by the EPA. 33 U.S.C. § 1342(d)(2) (Supp. III, 1973).

5. There is no provision in the FWPCA indicating Congressional intent to exclude any radioactive materials from the Act. Nevertheless, petitioners rely upon the House Report accompanying the House Bill (Pet. 17-18) as a basis for the exemption which they claim exists for the nuclear industry from the comprehensive regulatory scheme of the FWPCA.

The final version of the FWPCA was a substitute for both the Senate and House bills. Conference Report, S. Rep. No. 92-1236, 92d Cong., 2nd Sess. 99 (1972), 1 Leg. Hist. 281, 282. The Conference Report specifically states that the definition of the term "pollutant" was a conference substitute for both the Senate and House bills. 1 Leg. Hist. 326-327. Needless to say, the Conference Report contains no exception for any radioactive materials from the ambit of the FWPCA. 1 Leg. Hist. 326-327. The House Report should not be used to amend the provision substituted by the Conferees.

The section of the House Report relied upon by petitioners contains a second paragraph[5] immediately following the one cited by petitioners which discusses a second

[5] "It is the intent of the Committee that the exclusion from the term "pollutant" relating to the injection of water, gas, or other materials into wells applies only to the properly executed injection of materials into wells to stimulate the primary, secondary, or subsequent production of crude oil or natural gas, and to the properly executed disposal in wells of brines derived in association with the production of crude oil

proposed exclusion from the definition of "pollutant" under the FWPCA. The proposed exclusion, the injection of water, gas or other materials into wells, was made a specific exception in the FWPCA as finally adopted. 33 U.S.C. § 1362(6) (B) (Supp. III, 1973). In contrast to the treatment accorded this exclusion proposed by the House Committee, the FWPCA is totally silent as to any special treatment to be accorded "radioactive materials." The refusal of the Conference Committee to put an exception for certain "radioactive materials" into statutory language nullifies petitioners' reliance on this bit of legislative history. Furthermore, other portions of the legislative history indicate the intent of Congress to include all radioactive materials within the coverage of the FWPCA.[6] Without more, the House Report on the House version of the bill should not be the basis for an exemption for the entire nuclear industry from the FWPCA. *See Davidson v. Gardner*, 370 F.2d 803, 828 (6th Cir. 1966) and *United States v. Rohm and Haas Company*, 500 F.2d 167, 173 (5th Cir. 1974). As this court recently stated in *Train v. City of New York*, "legislative intention, without more is not legislation." 95 S.Ct. at 845.

[5] Continued
or natural gas, with appropriate precautions taken to assure that such injection or disposal does not lead to, or make substantially more likely, the degradation of usable water resources. For such exclusion to be effective, the State is required (1) to approve the well used either to facilitate production or for disposal purposes, and (2) to make a determination, based on sufficient investigation and evidence, that such degradation has not taken place and has not been or will not be made substantially more likely as a result of such injection or disposal."

[6] See 1 Leg. Hist. 161, 183, 198; 1 Leg. Hist. 745-746; 2 Leg. Hist. 1415, 1477. Senator Muskie, primary author and sponsor of the Act, continually reiterated his aversion to the AEC and his intent to rely on EPA in regulating all water pollution. See discussion, *supra* pp. 8-9.

The second bit of legislative history relied on by petitioners (Pet. 18), is particularly misleading. The cited floor debate merely reiterates that the FWPCA does not alter the licensing authority of the AEC. This debate did not consider any exclusions from the meaning of the term "radioactive materials" or exemptions from the comprehensive regulatory scheme of the FWPCA.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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May, 1975

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No. 74-1270

In the Supreme Court of the United States

OCTOBER TERM, 1974

RUSSELL TRAIN, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS

v.

COLORADO PUBLIC INTEREST RESEARCH GROUP, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY MEMORANDUM FOR PETITIONERS

ROBERT H. BORK,
Solicitor General,
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In the Supreme Court of the United States

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REPLY MEMORANDUM FOR PETITIONERS

Respondents assert that the "weight of the legislative history" of the Federal Water Pollution Control Act (FWPCA) "fully supports the holding of the court of appeals" (Br. in Opp. p. 5). In support of this contention, respondents rely on statements by Senator Muskie during the floor debate, indicating that EPA was to have comprehensive authority to regulate the discharge of pollutants into the water even when the source of the water pollution was a facility licensed by the Atomic Energy Commission (*id.* at pp. 8-12). But neither the Atomic Energy Commission nor its successors, the Nuclear Regulatory Commission and the Energy Research and Development Administration, have ever disputed this. Cf. *Calvert Cliffs' Coord. Com.* v. *Atomic Energy Commission*, 449 F.2d 1109 (C.A. D.C.). Applicants for nuclear facility

licenses have been consistently required to provide evidence that they have complied with applicable EPA and state water pollution control standards (see Pet. App. 8a).

Indeed, the issue in this case is important precisely *because* EPA has primary federal authority to determine water pollution standards and to assure compliance with such standards. For that reason, if the radioactive materials comprehensively regulated under the Atomic Energy Act are within the definition of pollutants in the FWPCA, the EPA also has the authority[1] to regulate their discharge from plants licensed by the Commission, as it clearly has the authority to limit the chemical and thermal pollution so discharged.

Although the legislative history upon which respondents rely indicates that FWPCA-regulated pollutants discharged by nuclear facilities must conform to EPA standards, it does not indicate that source, by-product and special nuclear material are such pollutants.[2] That is the issue to which the legislative history upon which we rely speaks directly (Pet. 17-18), and that is the issue our petition presents.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

MAY 1975.

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[1]And the duty, according to the court below (Pet. App. 12a, 16a).

[2]The legislative history that respondents deem so conclusive was neither cited nor relied upon by the court below.

Supreme Court, U.S.
FILED
AUG 2 1975
MICHAEL RODAK, JR., CLERK

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1270

RUSSELL TRAIN, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS

v.

COLORADO PUBLIC INTEREST RESEARCH GROUP, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 507 F. 2d 743. The opinion of the district court (Pet. App. C) is reported at 373 F. Supp. 991.

JURISDICTION

The judgment of the court of appeals was entered December 9, 1974 (Pet. App. A). On March 4, 1975, Mr. Justice White extended the time within which to petition for a writ of certiorari to and including April 8, 1975. The petition was filed on that date and was granted on June 2, 1975 (App. 56). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether nuclear waste material, comprehensively regulated and controlled through licenses issued under the Atomic Energy Act by the Nuclear Regulatory Commission, is a "pollutant" within the meaning of the Federal Water Pollution Control Act, which requires the Environmental Protection Agency to establish regulations and controls over pollutants by administering a detailed permit program.

STATUTES AND REGULATIONS INVOLVED

A. STATUTES

The Atomic Energy Act of 1954, 68 Stat. 919, as amended, 42 U.S.C. 2011 *et seq.*, provides in pertinent part:

§ 2012. *Congressional findings*

The Congress of the United States makes the following findings concerning the development, use, and control of atomic energy:

(a) The development, utilization, and control of atomic energy for military and for all other purposes are vital to the common defense and security.

* * * * *

(c) The processing and utilization of source, byproduct, and special nuclear material affect interstate and foreign commerce and must be regulated in the national interest.

(d) The processing and utilization of source, byproduct, and special nuclear material must be regulated in the national interest and in order to provide for the common defense and security and to protect the health and safety of the public.

(e) Source and special nuclear material, production facilities, and utilization facilities are affected with the public interest, and regulation by the United States of the production and utilization of atomic energy and of the facilities used in connection therewith is necessary in the national interest to assure the common defense and security and to protect the health and safety of the public.

* * * * * *

§ 2014. *Definitions.*

* * * * * *

(e) The term "byproduct material" means any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material.

* * * * * *

(v) The term "production facility" means (1) any equipment or device determined by rule of the Commission to be capable of the production of special nuclear material in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public; or (2) any important component part especially designed for such equipment or device as determined by the Commission.

* * * * *

(z) The term "source material" means (1) uranium, thorium, or any other material which is determined by the Commission pursuant to the provisions of section 2091 of this

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title to be source material; or (2) ores containing one or more of the foregoing materials, in such concentration as the Commission may by regulation determine from time to time.

(aa) The term "special nuclear materials" means (1) plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material which the Commission, pursuant to the provisions of section 2071 of this title, determines to be special nuclear material, but does not include source material; or (2) any material artificially enriched by any of the foregoing, but does not include source material.

* * * * * *

(cc) The term "utilization facility" means (1) any equipment or device, except an atomic weapon, determined by rule of the Commission to be capable of making use of special nuclear material in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public, or peculiarly adapted for making use of atomic energy in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public; or (2) any important component part especially designed for such equipment or device as determined by the Commission.

§ 2073. *Domestic distribution of special nuclear material.*

(a) *Licenses.*

The Commission is authorized (i) to issue

licenses to transfer or receive in interstate commerce, transfer, deliver, acquire, possess, own, receive possession of or title to, import, or export under the terms of an agreement for cooperation arranged pursuant to section 2153 of this title, special nuclear material, (ii) to make special nuclear material available for the period of the license, and, (iii) to distribute special nuclear material within the United States to qualified applicants requesting such material—

(1) for the conduct of research and development activities of the types specified in section 2051 of this title;

(2) for use in the conduct of research and development activities or in medical therapy under a license issued pursuant to section 2134 of this title;

(3) for use under a license issued pursuant to section 2133 of this title;

(4) for such other uses as the Commission determines to be appropriate to carry out the purposes of this chapter.

(b) *Minimum criteria for licenses.*

The Commission shall establish, by rule, minimum criteria for the issuance of specific or general licenses for the distribution of special nuclear material depending upon the degree of importance to the common defense and security or to the health and safety of the public of—

(1) the physical characteristics of the special nuclear material to be distributed;

(2) the quantities of special nuclear material to be distributed; and

(3) the intended use of the special nuclear material to be distributed.

* * * * *

(e) *License conditions.*

Each license issued pursuant to this section shall contain and be subject to the following conditions—

* * * * *

(2) no right to the special nuclear material shall be conferred by the license except as defined by the license;

(3) neither the license nor any right under the license shall be assigned or otherwise transferred in violation of the provisions of this chapter;

(4) all special nuclear material shall be subject to the right of recapture or control reserved by section 2138 of this title and to all other provisions of this chapter;

(5) no special nuclear material may be used in any utilization or production facility except in accordance with the provisions of this chapter;

(6) special nuclear material shall be distributed only on terms, as may be established by rule of the Commission, such that no user will be permitted to construct an atomic weapon;

(7) special nuclear material shall be distributed only pursuant to such safety standards as may be established by rule of the Commission to protect health and to minimize danger to life or property;

* * * * *

§ 2092. *License requirements for transfers [source material].*

Unless authorized by a general or specific license issued by the Commission, which the

Commission is authorized to issue, no person may transfer or receive in interstate commerce, transfer, deliver, receive possession of or title to, or import into or export from the United States any source material after removal from its place of deposit in nature, except that licenses shall not be required for quantities of source material which, in the opinion of the Commission, are unimportant.

§ 2093. *Domestic distribution of source material.*

(a) *License.*

The Commission is authorized to issue licenses for and to distribute source material within the United States to qualified applicants requesting such material—

(1) for the conduct of research and development activities of the types specified in section 2051 of this title;

(2) for use in the conduct of research and development activities or in medical therapy under a license issued pursuant to section 2134 of this title;

(3) for use under a license issued pursuant to section 2133 of this title; or

(4) for any other use approved by the Commission as an aid to science or industry.

* * * * *

§ 2111. *Domestic distribution; license; price limitations [byproduct material].*

No person may transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, own, possess, import, or export any

byproduct material, except to the extent authorized by this section or by section 2112 of this title [foreign distribution]. The Commission is authorized to issue general or specific licenses to applicants seeking to use byproduct material for research or development purposes, for medical therapy, industrial uses, agricultural uses, or such other useful applications as may be developed. * * *

Licensees of the Commission may distribute byproduct material only to applicants therefor who are licensed by the Commission to receive such byproduct material. The Commission shall not permit the distribution of any byproduct material to any licensee, and shall recall or order the recall of any distributed material from any licensee, who is not equipped to observe or who fails to observe such safety standards to protect health as may be established by the Commission or who uses such material in violation of law or regulation of the Commission or in a manner other than as disclosed in the application therefor or approved by the Commission. The Commission is authorized to establish classes of byproduct material and to exempt certain classes or quantities of material or kinds of uses or users from the requirements for a license set forth in this section when it makes a finding that the exemption of such classes or quantities of such material or such kinds of uses or users will not constitute an unreasonable risk to the common defense and security and to the health and safety of the public.

§ 2131. *License required.*

It shall be unlawful, except as provided in section 2121 of this title, for any person within the United States to transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, possess, use, import, or export any utilization or production facility except under and in accordance with a license issued by the Commission pursuant to section 2133 or 2134 of this title.

§ 2132. *Utilization and production facilities for industrial or commercial purposes.*

(a) Except as provided in subsections (b) and (c) of this section, or otherwise specifically authorized by law, any license hereafter issued for a utilization or production facility for industrial or commercial purposes shall be issued pursuant to section 2133 of this title.

* * * * *

§ 2133. *Commercial licenses.*

(a) *Conditions.*

The Commission is authorized to issue licenses to persons applying therefor to transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, possess, use, import, or export under the terms of an agreement for cooperation arranged pursuant to section 2153 of this title, utilization or production facilities for industrial or commercial purposes. Such licenses shall be issued in accordance with the provisions of subchapter XV of this chapter [Judicial Review and Administrative Procedure] and subject to such conditions as the Commission may by rule or regulation establish to effectuate the purposes and provisions of this chapter.

(b) *Nonexclusive basis.*

The Commission shall issue licenses on a nonexclusive basis to persons applying therefor (1) whose proposed activities will serve a useful purpose proportionate to the quantities of special nuclear material or source material to be utilized; (2) who are equipped to observe and who agree to observe such safety standards to protect health and to minimize danger to life or property as the Commission may by rule establish; and (3) who agree to make available to the Commission such technical information and data concerning activities under such licenses as the Commission may determine necessary to promote the common defense and security and to protect the health and safety of the public. All such information may be used by the Commission only for the purposes of the common defense and security and to protect the health and safety of the public.

(c) *License period.*

Each such license shall be issued for a specified period, as determined by the Commission, depending on the type of activity to be licensed, but not exceeding forty years, and may be renewed upon the expiration of such period.

(d) *Limitations.*

No license under this section may be given to any person for activities which are not under or within the jurisdiction of the United States, except for the export of production or utilization facilities under terms of an agreement for cooperation arranged pursuant to section 2153 of this title, or except under the provisions of section 2139 of this title. * * *

In any event, no license may be issued to any person within the United States if, in the opinion of the Commission, the issuance of a license to such person would be inimical to the common defense and security or to the health and safety of the public.

§ 2134. *Medical therapy, research, and development licenses; limitations.*

(a) The Commission is authorized to issue licenses to persons applying therefor for utilization facilities for use in medical therapy. In issuing such licenses the Commission is directed to permit the widest amount of effective medical therapy possible with the amount of special nuclear material available for such purposes and to impose the minimum amount of regulation consistent with its obligations under this chapter to promote the common defense and security and to protect the health and safety of the public.

(b) As provided for in subsection (b) or (c) of section 2132 of this title, or where specifically authorized by law, the Commission is authorized to issue licenses under this subsection to persons applying therefor for utilization and production facilities for industrial and commercial purposes. In issuing licenses under this subsection, the Commission shall impose the minimum amount of such regulations and terms of license as will permit the Commission to fulfill its obligations under this chapter.

(c) The Commission is authorized to issue licenses to persons applying therefor for utilization and production facilities useful in the

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conduct of research and development activities of the types specified in section 2051 of this title and which are not facilities of the type specified in subsection (b) of this section. The Commission is directed to impose only such minimum amount of regulation of the licensee as the Commission finds will permit the Commission to fulfill its obligations under this chapter to promote the common defense and security and to protect the health and safety of the public and will permit the conduct of widespread and diverse research and development.

(d) No license under this section may be given to any person for activities which are not under or within the jurisdiction of the United States, except for the export of production or utilization facilities under terms of an agreement for cooperation arranged pursuant to section 2153 of this title or except under the provisions of section 2139 of this title. No license may be issued to any corporation or other entity if the Commission knows or has reason to believe it is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government. In any event, no license may be issued to any person within the United States if, in the opinion of the Commission, the issuance of a license to such person would be inimical to the common defense and security or to the health and safety of the public.

§ 2201. *General duties of Commission.*

In the performance of its functions the Commission is authorized to—

* * * * *

(b) *Standards governing use and possession of material.*

establish by rule, regulation, or order, such standards and instructions to govern the possession and use of special nuclear material, source material, and byproduct material as the Commission may deem necessary or desirable to promote the common defense and security or to protect health or to minimize danger to life or property;

* * * * *

Sections 101(a)(1) and (2), (b), and (f), 402(a)(1), 502(6), and 511(a)(1) of the Federal Water Pollution Control Act, 62 Stat. 1155, as amended by the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816 *et seq.*, 33 U.S.C. (Supp. III) 1251(a)(1) and (2), (b), and (f), 1342(a)(1), 1362(6), and 1371(a)(1), provide in pertinent part:

DECLARATION OF GOALS AND POLICY

SEC. 101. (a) The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this Act—

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

* * * * *

(b) It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

* * * * *

(f) It is the national policy that to the maximum extent possible the procedures utilized for implementing this Act shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government.

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

SEC. 402. (a)(1) Except as provided in sections 318 and 404 of this Act [33 U.S.C. (Supp. III) 1328, 1344], the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301 (a) [33 U.S.C. (Supp. III) 1311(a)], upon

condition that such discharge will meet either all applicable requirements under sections 301, 302, 306, 307, 308, and 403 of this Act [33 U.S.C. (Supp. III) 1311, 1312, 1316, 1317, 1318, 1343], or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act.

GENERAL DEFINITIONS

SEC. 502. Except as otherwise specifically provided when used in this Act:

* * * * *

(6) The term "pollutant" means * * * chemical wastes, * * * radioactive materials, heat, * * * and industrial * * * waste discharged into water. * * *.

OTHER AFFECTED AUTHORITY

SEC. 511. (a) This Act shall not be construed as (1) limiting the authority or functions of any officer or agency of the United States under any other law or regulation not inconsistent with this Act; * * *.

B. REGULATIONS

Sections 50.34a and 50.36a of Title 10, Code of Federal Regulations, read in part:

§ 50.34a *Design objectives for equipment to control releases of radioactive material in effluents—nuclear power reactors.*

(a) An application for a permit to construct a nuclear power reactor shall include a description of the preliminary design of equipment to

be installed to maintain control over radioactive materials in gaseous and liquid effluents produced during normal reactor operations, including expected operational occurrences. In case of an application filed on or after January 2, 1971, the applcation shall also identify the design objectives, and the means to be employed, for keeping levels of radioactive material in effluents to unrestricetd areas as low as practicable. The term "as low as practicable" as used in this part means as low as is practicably achievable taking into account the state of technology, and the economies of improvements in relaiton to benefits to the public health and safety and in relation to the uitlization of atomic energy in the public interest.

§ 50.36a *Technical specifications on effluents from nuclear power reactors.*

(a) In order to keep releases of radioactive materials to unrestricted areas during normal reactor operations, including expected operational occurrences, as low as practicable, each license authorizing operation of a nuclear power reactor will include technical specifications that, in addition to requiring compliance with applicable provisions of § 20.106 of this chapter, require:

(1) That operating procedures developed pursuant to § 50.34a(c) for the control of effluents be established and followed and that equipment installed in the radioactive waste system, pursuant to § 50.34a(a) be maintained and used.

(2) The submission of a report to the Commission within 60 days after July 1 of 1971, and within 60 days after January 1 and July 1 of each year thereafter, specifying the quantity of each of the principal radionuclides released to unrestricted areas in liquid and in gaseous effluents during the previous 6 months of operation, and such other information as may be required by the Commission to estimate maximum potential annual radiation doses to the public resulting from effluent releases. If quantities of radioactive materials released during the reporting period are significantly above design objectives, the report shall cover this specifically. On the basis of such reports and any additional information the Commission may obtain from the licensee or others, the Commission may from time to time require the licensee to take such action as the Commission deems appropriate.

(b) In establishing and implementing the operating procedures described in paragraph (a) of this section, the licensee shall be guided by the following considerations: Experience with the design, construction and operation of nuclear power reactors indicates that compliance with the technical specifications described in this section will keep average annual releases of radioactive material in effluents at small percentages of the limits specified in § 20.106 of this chapter and in the operating license. At the same time, the licensee is permitted the flexibility of operation, compatible with considerations of health and safety, to assure that the public is provided a dependable source of power

even under unusual operating conditions which may temporarily result in releases higher than such small percentages, but still within the limits specified in § 20.106 of this chapter and the operating license. It is expected that in using this operational flexibility under unusual operating conditions, the licensee will exert his best efforts to keep levels of radioactive material in effluents as low as practicable.

Sections 125.1(y) and 125.2(a)(1) of Title 40, Code of Federal Regulations, read in part:

§ 125.1 *Definitions.*

* * * * *

(y) The term "pollutant" means * * * radioactive materials * * * discharged into water. * * *

COMMENT.—The legislative history of the [Federal Water Pollution Control] Act [Amendments of 1972] reflects that the term "radioactive materials" as included within the definition of "pollutant" in section 502 of the Act [33 U.S.C. (Supp. III) 1362] covers only radioactive materials which are not encompassed in the definition of source, byproduct, or special nuclear materials as defined by [Section 11e, s, t (redesignated z, aa) of] the Atomic Energy Act of 1954, as amended [42 U.S.C. 2014(e), (z), (aa)], and regulated pursuant to the latter Act. Examples of radioactive materials not covered by the Atomic Energy Act and, therefore, included within the term "pollutant" are radium and accelerator producted isotopes. (H.R. Rep. 92–911, 92d Cong. 2d Sess., 131, March 11, 1972; 117 Cong. Rec.

17401, daily ed., November 2, 1971; 118 Cong. Rec. 9115, daily ed., October 4, 1972.)

* * * * *

§ 125.2 *Scope and purpose.*

(a)(1) The regulations in this part prescribe the policy and procedures to be followed in connection with applications for federally issued permits authorizing discharges into the navigable waters, the waters of the contiguous zone, and the oceans, during the periods that the Administrator of the Environmental Protection Agency is authorized to issue such permits pursuant to sections 402 and 405 of the Act [33 U.S.C. (Supp. III) 1342, 1345].

STATEMENT

Prior to the decision below, the Atomic Energy Commission—now the Nuclear Regulatory Commission (NRC) and the Energy Research and Development Administration (ERDA)[1]—exercised exclusive authority to regulate radioactive effluents released from NRC-licensed electrical power plants and from government research and production facilities operated by contractors for ERDA.[2]

[1] NRC and ERDA succeeded to the powers of the Atomic Energy Commission on January 19, 1975, pursuant to the Energy Reorganization Act of 1974, Pub. L. 93–438, 88 Stat. 1233–1254. See 40 Fed. Reg. 3242, 3520. In this brief, references to NRC will, for clarity, include the AEC before the reorganization. Both NRC and ERDA concur in the views expressed herein.

[2] As discussed *infra*, p. 52, the EPA establishes radiation standards which limit the total amount of radiation in the environment from major categories of sources. See also n. 25, *infra*.

1. THE ATOMIC ENERGY ACT

The Atomic Energy Act of 1946, 60 Stat. 755, established a federal monopoly in the production and use of radioactive materials necessary to provide nuclear energy or created in the production of such energy. In 1954, Congress substantially revised the Act, 68 Stat. 919, providing the base upon which all later amendments have been built, 42 U.S.C. 2011, *et seq.* The 1954 revision permitted private parties to produce and utilize nuclear energy for peaceful purposes. But Congress conditioned private participation on compliance with a comprehensive and stringent federal licensing program designed to protect the common defense and the public health and safety. Under the revised Act, the production, utilization and disposal of source,[3] special nuclear,[4] and byproduct materials[5] may be accomplished only in accordance with licenses issued by the NRC.

[3] "The term 'source material' means (1) uranium, thorium, or any other material which is determined by the Commission pursuant to the provisions of section 2091 of this title to be source material; or (2) ores containing one or more of the foregoing materials, in such concentration as the Commission may by regulation determine from time to time." 42 U.S.C. 2014(z).

[4] "The term 'special nuclear material' means (1) plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material which the Commission, pursuant to the provisions of section 2071 of this title, determines to be special nuclear material, but does not include source material; or (2) any material artificially enriched by any of the foregoing, but does not include source material." 42 U.S.C. 2014(aa).

[5] "The term 'byproduct material' means any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process or producing or utilizing special nuclear material." 42 U.S.C. 2014(e).

The NRC has established by regulation maximum permissible releases of radioactivity into the environment by licensees, 10 C.F.R. Part 20, Appendix B, Table II.[6] Although Part 20 establishes the maximum permissible discharges that may be authorized, individual licenses further limit the amount of licensed material[7] which may be discharged. For example, the NRC requires, consistent with the Federal Radiation Council recommendations, that nuclear facilities be designed to insure that levels of radioactive materials in effluents are as low as practicable (10 C.F.R. 50.34a).[8]

[6] These limits are based on the recommendations of the International Commission on Radiological Protection, the National Council on Radiation Protection and Measurements, a federally chartered nonprofit corporation which collects, analyzes, and disseminates information and recommendations concerning radiation protection, 78 Stat. 320, and the Federal Radiation Council, a presidential advisory council composed of the Secretaries of Defense, Commerce, Labor, and HEW, and the chairman of the AEC. EPA succeeded to FRC functions in Reorganization Plan No. 3 of 1970, 84 Stat. 2086, 5 U.S.C. App., p. 609.

[7] The term "licensed material" as used herein means source, byproduct and special nuclear material, the acquisition, use, transfer and disposal of which is comprehensively licensed under the Atomic Energy Act. 10 C.F.R. 20.3(a)(8).

[8] The NRC issues licenses governing the possession and use of source, byproduct and special nuclear materials. The licenses authorize a wide range of activities involving these materials, including medical, research and commercial applications. Under the decision below all these licensed applications would also be subject to EPA licensing to the extent that they regulate discharges of these materials into water. We will, however, focus here, as respondents have below, on the licenses for nuclear power facilities.

In their complaint (App. 6–15), respondents also point to the Rocky Flats Plant—a Federal facility operated for ERDA

The NRC has recently adopted[9] an Appendix I to Part 50, containing numerical criteria which set forth one acceptable method of establishing compliance with the "as low as practicable" standard concerning effluent releases from light-water-cooled power reactors, 40 Fed. Reg. 19439 (May 5, 1975).[10] In so

by a private contractor to fabricate plutonium into nuclear weapon parts. ERDA is also responsible for the operation of approximately 24 other facilities which discharge low levels of source, byproduct and special nuclear materials, including the gaseous diffusion plants which enrich uranium to obtain the fissionable isotope U–235. Under Executive Order 11752 (3A C.F.R. (1973 Comp.), p. 240), all thes efacilities must conform to the same effluent standards imposed on commercial nuclear facilities by the Nuclear Regulatory Commission. ERDA requires effluent and environmental monitoring programs to insure that applicable standards are achieved. In almost all cases, these ERDA facilities achieve discharge levels on the order of one percent of the permissible limits of 10 C.F.R. Part 20.

[9] The new regulation was published for public comment on June 9, 1971 (36 Fed. Reg. 11113), and a public rule-making hearing was announced on November 30, 1971 (36 Fed. Reg. 22775). The hearing before a 3-member hearing board began on January 20, 1972; it was suspended in May 1972 for preparation of an Environmental Impact Statement, which issued July 26, 1973. The hearing thereupon resumed in November 1973, and was completed December 6, 1973, after 25 days of hearings, in which 18 persons, including EPA, made limited appearances, a 4172-page hearing transcript was compiled, and thousands of pages of exhibits were admitted. The Commission heard oral arguments on the proposed regulations on June 6, 1974 (40 Fed. Reg. 19439–19440).

[10] All but one of the commercial nuclear power reactors that currently have operating licenses are light-water-cooled power reactors. The Fort St. Vrain facility uses a high temperature gas-cooled reactor. It is, of course, subject to the general "as low as practicable" requirement of Part 50.

doing, it noted that the International Commission on Radiological Protection has suggested that the formulation "as low as is reasonably achievable"—specifying that both economic and social considerations are to be taken into account—better expresses the basic concept of radiation protection intended. The NRC directed its staff to consider whether the suggested formulation should be substituted for the "as low as practicable" criterion in all of its regulations. It noted that the numerical values it was therein adopting "will not, of course, be affected by the forthcoming change in terminology." 40 Fed. Reg. 19440.

A utility wishing to construct a nuclear power facility must apply to the NRC for a construction permit, and submit a detailed report concerning all aspects of the proposed plant."

The NRC's regulatory staff reviews the application and issues a formal safety evaluation and an environmental impact statement (10 C.F.R. Part 51; 42 U.S.C. 4332(2)(*c*)). On the average, the staff in-

[11] The application must include (10 C.F.R. 50.34a(a)): "[A] description of the preliminary design of equipment to be installed to maintain control over radioactive materials in gaseous and liquid effluents produced during normal reactor operations, including expected operational occurrences. In the case of an application filed on or after January 2, 1971, the application shall also identify the design objectives, and the means to be employed, for keeping levels of radioactive material in effluents to unrestricted areas as low as practicable. The term 'as low as practicable' as used in this part means as low as is practicably achievable taking into account the state of technology, and the economics of improvements in relation to benefits to the public health and safety and in relation to the utilization of atomic energy in the public interest." This regulation was amended on May 5, 1975, to require consideration of Appendix I, Part 50 (see p. 22, *supra*). 40 Fed. Reg. 19442.

vests approximately 20 man-years of professional effort in the safety review. The Advisory Committee on Reactor Safeguards (an independent group of authorities on various aspects of nuclear technology and safety) also reviews the application, and issues its recommendations (42 U.S.C. 2039, 2232(b)). Following this review, a public adjudicatory hearing on the proposal is held before a three-member hearing board composed of two technical experts and a chairman, who is an attorney.[12] A construction permit may issue only if the hearing board concludes that the applicant is equipped to observe, and will observe, established safety standards to protect health and to minimize danger to life and property (42 U.S.C. 2133(b)). The construction permit incorporates the application as amended on the basis of these reviews, which specifies in detail the requirements for the construction of the plant, including effluent control systems. 10 C.F.R. Part 50. The actual process of construction is closely supervised by Commission personnel who visit the site frequently to determine whether construction complies with the construction permit. The subsequent issuance of an operating license (with a maximum term of 40 years) is contingent upon the NRC's finding[13] that construction has conformed to the construction permit, and that the facility will operate in conformity with the

[12] The NRC's rules provide for intervention by interested individuals and groups as well as a more informal "limited appearance." 10 C.F.R. 2.714, 2.715.

[13] An opportunity for a public hearing must be provided before such a finding is made. 42 U.S.C. 2239.

Atomic Energy Act and NRC regulatory requirements.[14] One such requirement is compliance with operating procedures, developed and approved at the construction permit stage, to keep radioactive effluent discharges as low as practicable (in practice, a minute fraction of NRC's effluent limits); in addition, there must be assurance that such discharges will be monitored and reports of amounts of radioactive materials discharged will be made to the NRC every six months. 10 C.F.R. 50.36a.

2. THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972

The Federal Water Pollution Control Act, as amended in 1972 (86 Stat. 816 *et seq.*, 33 U.S.C. (Supp. III) 1251–1376) (FWPCA), established a regulatory system to control, and eventually eliminate, water pollution. The FWPCA includes a broad definition of pollutants, including, *inter alia,* chemical wastes, radioactive materials, heat, and industrial waste. 33 U.S.C. (Supp. III) 1362(6). The Administrator of EPA is directed to establish guidelines to limit the content of pollutants in effluent discharges into water. These

[14] The Atomic Energy Act's requirements (42 U.S.C. 2235, 2232(a), 2134(d)) are restated in the NRC's regulations (10 C.F.R. 50.57(a)), which condition issuance of an operating license upon findings, *inter alia*, that:

"(3) There is reasonable assurance (i) that the activities authorized by the operating license can be conducted without endangering the health and safety of the public, and (ii) that such activities will be conducted in compliance with the regulations in this chapter; and"

"(6) The issuance of the license will not be inimical to * * * the health and safety of the public."

guidelines are to be developed after consultation with appropriate federal agencies and opportunity for public hearings. 33 U.S.C. (Supp. III) 1314(b). The guidelines must identify the degree of reduction of pollutant discharges attainable for various classes of sources, and the factors to be taken into account in determining required control measures within such classes in three stages: using the best practicable control technology, using the best control technology available,[15] and achieving total elimination of pollutants from discharges.

Once the guidelines are established, effluent limitations are to be defined so as to require application

[15] The Administrator has explained the meaning of these terms in the uniform Request for Proposal which is issued to invite proposals from contractors to write technical support documents for effluent regulations under Sections 301 and 304 of the Federal Water Pollution Control Act (33 U.S.C. (Supp. III) 1311, 1314). A copy of the Request for Proposal is herewith lodged with this Court (at pp. 9–11). The best practicable control technology currently available (BPT) is defined by the Agency in most cases as the effluent control attained by the average of the best performing plants in an industrial category. The agency considers, in establishing this level, both "end-of-pipe" treatment facilities and "in-plant" waste management techniques considered to be normal practice within an industrial category. The best available technology economically achievable (BAT) is the best control and treatment technology employed by a specific point source within an industrial category, or capable of being transferred from another industrial category. The Agency considers the full-range of potential in-plant controls, as well as end-of-pipe treatment facilities. Both BPT and BAT are established only after evaluation of such factors as the size and age of facilities involved, the cost of controls, and the nonwater quality environmental impact.

of the best practicable control technology by July 1, 1977, and, by July 1, 1983, the best available technology economically achievable. 33 U.S.C. (Supp. III) 1311(b). The Act further states that it is the national goal to eliminate all discharges of pollutants by 1985. 33 U.S.C. (Supp. III) 1251(a)(1).

These limitations are applied through a permit program; the discharge of pollutants without a permit is unlawful. 33 U.S.C. (Supp. III) 1311(a). Initially, permits are to be issued by the EPA, but as the States develop programs that comply with the FWPCA, permit-issuing authority is to be turned over to them. 33 U.S.C. (Supp. III) 1342.[16] In the meantime, permits for a maximum term of 5 years, are issued by EPA after an opportunity for a public hearing. These define what materials may be discharged, and in what quantities; establish monitoring and reporting requirements; and, as necessary, require adherence to specified schedules for compliance with the 1977 and 1983 deadlines. 33 U.S.C. (Supp. III) 1342(a); 40 C.F.R. Part 125.[17]

[16] The permit program for Colorado, where this case originated, was approved by EPA on April 8, 1975, and is currently in effect. 40 Fed. Reg. 16713.

[17] In addition, EPA is directed to establish federal standards of performance for new sources in specifically defined categories, such as steam electric powerplants, meat product and rendering processing, feedlots, textile mills, chemicals manufacturing, and petroleum refining. These standards will require that such facilities are designed, built, equipped and operated so as to minimize the discharge of pollutants. 33 U.S.C. (Supp. III) 1316(a)(1). Although the Act lists 27 categories of new sources, the Administrator is expected to add other types of facilities to this list as he develops the capability to establish standards for them. 33 U.S.C. (Supp. III) 1316(b).

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On May 22, 1973, the Administrator of the EPA adopted regulations prescribing the policy and procedures to be followed in the issuance of federal permits authorizing discharges into the Nation's waters. 40 C.F.R. Part 125. Byproduct, source, and special nuclear material are excluded from the program established by the regulations, in accord with the legislative intent of the FWPCA as reflected in its legislative history. 40 C.F.R. 125.1(y), comment.

3. THE PROCEEDINGS BELOW

Respondents, plaintiffs below, are Colorado-based organizations and Colorado residents claiming potential harm from effluent discharges from the Fort St. Vrain Nuclear Generating Station, owned and operated by an NRC licensee, and from the Rocky Flats nuclear weapons plant, owned by the government and operated by an ERDA contractor (App. 9–11). They brought this suit under Section 505 of the FWPCA, 33 U.S.C. (Supp. III) 1365, which consents to "citizen suits" against EPA to require it to perform nondiscretionary duties under the FWPCA. Respondents alleged that the FWPCA requires the EPA to regulate all radioactive materials, including those regulated under the Atomic Energy Act, to control discharges of such materials into water, and to subject them to "the various steps required by the Act leading to the complete elimination of all pollutants from the Nation's navigable waters by 1985" (App. 13).

On cross-motions for summary judgment (App. 16–18), the district court granted EPA's motion for summary judgment and dismissed respondents' complaint (App. 19). The court concluded that "two agencies of peculiar and extreme expertise" (Pet. App. 21a), the AEC and the EPA, were correct in their conclusion that the FWPCA does not apply to source, special nuclear, and byproduct material. The court relied upon the legislative history of the FWPCA (Pet. App. 22a) and on the "wasted effort, * * * confusion, and possible danger to the public" likely to result from dual regulation (Pet. App. 23a). The court also stated that requiring EPA to regulate effluents from AEC-licensed plants might have an adverse effect on energy supplies (Pet. App. 26a).

The court of appeals reversed, holding that the plain meaning of the FWPCA requires the EPA to regulate discharges of all radioactive materials, including those controlled by the AEC.[18] Therefore, the court of appeals decided, "there is no need to address ourselves to the ofttimes difficult task of ascertaining legislative intent through legislative history" (Pet. App. 12a). In the court's view, exclusive control over these materials had not been reserved to the NRC by the Atomic Energy Act of 1954 because the FWPCA constituted a later expression of congressional intent to "vest the Environmental Protection Agency with the duty of regulating the dis-

[18] The States of Arkansas, Kansas, Michigan, Minnesota, Pennsylvania, and Washington participated as *amici curiae* in the court of appeals (App. 1), claiming that the 1972 amendments to the FWPCA required EPA—and eventually the States, under EPA-approved state permit programs—to control discharges of all radioactive effluents into water.

charge of all radioactive materials into navigable waters" (Pet. App. 16a). The court concluded that the FWPCA was to that extent inconsistent with the Atomic Energy Act (*id.* at 14a). The court remanded the case for further proceedings in the district court.

One month after the decision by the court of appeals, the Atomic Energy Commission went out of existence, and its regulatory and licensing functions were transferred to the newly established Nuclear Regulatory Commission (see note 1, *supra*).

SUMMARY OF ARGUMENT

In contrast to the usual case involving questions of statutory interpretation, the issue here does not require the Court to determine how Congress *would have* dealt with a matter it did not specifically consider. Instead, we have here a broad statutory term, the meaning of which Congress thoroughly considered, and this legislative history clearly indicates the term is not applicable to the materials here involved. Thus, although the statutory definition of "pollutants" which may not be discharged into water without a permit from EPA includes "radioactive materials" (33 U.S.C. (Supp. III) 1362(6)), the legislative history plainly reveals that this term does not include source, byproduct or special nuclear materials, which are already comprehensively regulated by the NRC pursuant to the Atomic Energy Act. This understanding that NRC-licensed materials were not considered "pollutants" is stated expressly in the pertinent House Report (1 Leg. Hist. 753, 818 [19]), it is reflected in the bill's sponsors' assurances in debate in both houses (1 Leg. Hist. 587–588; 2 Leg. Hist. 1265–1266), it served as the articulated premise in the House discussion and rejection of an amendment proposed by those who wished to limit NRC authority over these materials (1 Leg. Hist. 544–557), and it was confirmed in an explanation of the Conference Committee's report on the final bill (1 Leg. Hist. 226–227). This clear expression of legislative intent, we submit, definitively settles the meaning of the term used in the Act.

This interpretation, moreover, is entirely consistent with the legislative scheme, under which comprehensive regulation of the acquisition, use, transfer and disposal of source, byproduct and special nuclear material is comprehensively regulated by the NRC, while the EPA has the responsibility to establish standards limiting the total amount of permissible radiation in the environment. Under this division of authority, NRC controls the amount of source, byproduct or special nuclear material that may be contained in the discharges from any licensed user of such materials, assuring that the total contributions of effluent by all such users do not exceed EPA standards. This regulatory system, although requiring close cooperation

[19] "Leg. Hist." refers to the two-volume Committee Print entitled "A Legislative History of the Water Pollution Control Act Amendments of 1972 Together With A Section-by-Section Index," prepared by the Environmental Policy Division of the Congressional Research Service of the Library of Congress, 93d Cong., 1st Sess. (1973).

between the two agencies, avoids redundant regulation of the same users of the same materials to achieve the same ends—a redundancy that could lead only to wasteful duplication if the same limitations were imposed by both agencies, or confusion and inefficiency if the agencies attempted to impose different limitations and subject the same facilities to different requirements.

ARGUMENT

NUCLEAR WASTE MATERIALS COMPREHENSIVELY REGULATED AND CONTROLLED BY THE NRC ARE NOT "POLLUTANTS" WITHIN THE MEANING OF THE FEDERAL WATER POLLUTION CONTROL ACT

I

INTRODUCTION

Significant legal disputes about the meaning of statutes usually require courts to resolve issues that Congress neither expressly discussed nor specifically anticipated. In the typical case, as Judge Learned Hand put it, "Legal interpretation involves an imaginative projection upon the occasion that has arisen of what *would have been* the choice of the lawmakers."[20] But with respect to the case at hand, these observations are wide of the mark. This is not a typical case of statutory construction; here, there is no need to engage in the sometimes difficult task of di-

[20] Remarks upon the presentation of a portrait of Mr. Justice Frankfurter in 1960, quoted in Mishkin & Morris, *On Law in Courts* 449 (1965) (emphasis supplied).

vining what Congress would have thought about a matter it did not precisely consider. For the question presented by this case was the subject of direct and explict congressional attention.

As we fully discuss later, the House Report stated in no uncertain terms that the 'radioactive materials" to be considered "pollutants" under Section 502(6) of the Act (33 U.S.C. (Supp. III) 1362(6)) did not include source, byproduct or special nuclear materials already regulated comprehensively by the NRC pursuant to the Atomic Energy Act. In the Senate, the bill's sponsor gave assurances that the legislation would not "in any way affect" the AEC's regulatory authority or a recent court of appeals decision (holding that the AEC had exclusive authority to license the nuclear materials listed in the House Report), a decision not only deliberately left standing by the Senate Committee, but also later affirmed by this Court. Moreover, the House rejected an amendment to give States regulatory authority over such nuclear materials and, during the floor debate on the amendment, both sides expressed the understanding that the bill itself did not include AEC-licensed materials as "pollutants" that EPA would also regulate. After the Conference Committee reported out the final bill, a ranking Member of that Committee stated on the House floor—in response to a question directly on point—that the Conferees had adhered to the exclusion of AEC-licensed material from the "radioactive materials" that would be considered "pollutants."

Despite this direct and explicit legislative history, the Court will search the opinion below in vain for a

single citation to any of the foregoing congressional materials. To the court of appeals, the statute was "clear" and "unambiguous," and had a "plain and obvious meaning" (Pet. App. 9a–10a)—a meaning precisely the opposite of the congressional understanding indicated above. And since the meaning of the statute was plain to the court below, it decided not to "concern [itself] with the legislative history of the 1972 Amendments" (*id.* at 12a).

But as Mr. Justice Holmes observed, the plain meaning doctrine "is rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists." *Boston Sand and Gravel Co.* v. *United States*, 278 U.S. 41, 48.[21] Here such evidence does exist. Moreover, the underlying assumption of the plain meaning doctrine "is that a statutory meaning which seems necessary to an interpreting judge will also have seemed necessary to any other person who may have referred to the language of the

[21] Accord *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 543–544 ("[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'"). See also *Chemehuevi Tribe of Indians* v. *Federal Power Commission*, No. 73–1380, decided March 3, 1975, slip op. 7–8; *Cass* v. *United States*, 417 U.S. 72, 75–76; *Harrison* v. *Northern Trust Co.*, 317 U.S. 476, 479; *United States* v. *Dickerson*, 310 U.S. 554, 561–562; *United States* v. *Fisher*, 2 Cranch 358, 386 (Marshall, C.J.); and Judge Learned Hand's concurring opinion in *Guiseppi* v. *Walling*, 144 F. 2d 608, 624 (C.A. 2), affirmed *sub nom. Gemsco, Inc.* v. *Walling*, 324 U.S. 244.

statute for guidance in his action."[22] It is thus significant that the words in the statute we deal with here were intended not to "serve as directions for ordinary people,"[23] but as instructions to the EPA Administrator, who could be expected to have an in-depth knowledge of the Act and its legislative history.[24]

With these considerations in mind, we now proceed to discuss in greater detail the meaning of the statute and the policy factors that make it still more unlikely that Congress could have intended the result reached by the court below.

II

IN ENACTING THE FWPCA, CONGRESS SPECIFICALLY DECIDED NOT TO GIVE EPA AUTHORITY TO REGULATE NUCLEAR MATERIAL LICENSED BY NRC

Under the Atomic Energy Act, the NRC has authority—and no one could contend otherwise—to regulate through a licensing system the release into water of source, byproduct and special nuclear materials (see pp. 20 to 25, *supra*). The question here is whether the NRC's authority remains exclusive or whether, in enacting the Federal Water Pollution

[22] Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes*, 25 Wash. U. L. Q. 2, 22–23 (1939).

[23] *Estep* v. *United States*, 327 U.S. 114, 136 (Mr. Justice Frankfurter, concurring).

[24] See Hart & Sachs, *The Legal Process* 1413 (tent. ed. 1957) ("The need for clarity is at its greatest in words addressed to private persons. Words addressed primarily to judges, on the other hand, may fairly presuppose the powers of analysis and ratiocination which judges supposedly have. Words addressed to officials of other kinds may presuppose the characteristic capacity for understanding of these officials.").

Control Act Amendments of 1972, Congress altered the existing regulatory system for such nuclear material and created a new system under which the NRC's licensing program would exist side-by-side with a permit program established under the new Act, and administered by EPA, controlling the same nuclear materials and regulating the same facilities for the same purposes at the same time.[25]

The question arises because the definition of "pollutant" in Section 502(6) of the Act (33 U.S.C. (Supp. III) 1362(6)) includes, *inter alia,* "radioactive materials," and the materials licensed by the NRC under

[25] The issue is not, as respondents suggest (Brief in Opp. 6), whether the nuclear power industry is exempt from the FWPCA. No such claim is made. Indeed, as we discuss later, respondent's misinterpretation of the legislative history may be due to the failure to recognize the careful distinction reflected therein between the *thermal* effects of discharges from nuclear facilities, which are clearly subject to control under the FWPCA, and the discharges of NRC-licensed materials, which are not. Of course, discharges of pollutants, as defined in the FWPCA, are comprehensively regulated under that Act, whether the pollutants are discharged from nuclear facilities or not. See 38 Fed. Reg. 2679. But NRC-licensed materials are not "pollutants" as defined in the Act.

Nor is it significant, as respondents suggest (Brief in Opp. 7–8), that the FWPCA makes it unlawful to discharge "any radiological * * * warfare agent or high-level radioactive waste into the navigable waters." 33 U.S.C. (Supp. III) 1311 (f). Such discharges would be equally improper under the Atomic Energy Act and the regulations issued thereunder; the flat prohibition in the FWPCA does not require the EPA to evaluate the technology for the control of such discharges and establish its own, possibly conflicting, limitations on them, as it must for "pollutants" defined in Section 502(6).

the Atomic Energy Act are radioactive.[26] While it is true that a broad reading of the Section 502(6) phrase "radioactive materials" to encompass NRC-licensed materials would result in requiring EPA to administer a permit program that overlapped the NRC's existing licensing system, the phrase was not further defined and the Act itself therefore does not clearly indicate whether such a broad construction is the correct reading.

Congress did specifically state, however, that the Act is not to be construed as limiting the authority of any federal agency under any other law not inconsistent with the Act. 33 U.S.C. (Supp. III) 1371(a)(1). Congress also directed that the Act be implemented in a way that "prevents needless duplication and unnecessary delays at all levels of government." 33 U.S.C. (Supp. III) 1251(f). Since the Act supplements but does not override or duplicate related but not inconsistent statutory provisions, it would therefore seem at least doubtful that Congress meant to require the EPA to regulate the type of nuclear waste material already extensively and comprehensively controlled by the NRC under the Atomic

[26] Radioactive materials not regulated under the Atomic Energy Act include certain naturally occurring and accelerator produced materials, such as radium and some isotopes. EPA is preparing effluent guidelines for radium, uranium and thorium released in ore mining and milling operations. Accelerator isotopes occur primarily in hospital effluents in combination with NRC-licensed materials. NRC licenses issued to such users prohibit discharges of NRC-licensed materials which, when added to all other isotope discharges, will result in radioactivity levels in excess of specified amounts.

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Energy Act. When the pertinent legislative history is consulted, there is no longer any doubt whether Congress intended such a result: it becomes certain it did not. We turn first to the committee reports since, as Judge Friendly has stated, "if an intent clearly expressed in committee reports is within the permissible limits of the language and no construction manifestly more reasonably suggests itself, a court does pretty well to read the statute to mean what the few legislators having the greatest concern with it said it meant to them." [27]

The House Committee Report could scarcely be more explicit: [28]

> The term "pollutant" as defined in the bill includes "radioactive materials." *These materials are those not encompassed in the definition of source, byproduct, or special nuclear materials as defined by the Atomic Energy Act of 1954, as amended, and regulated pursuant to that Act. "Radioactive materials" encompassed by this bill are those beyond the jurisdiction of the Atomic Energy Commission.* Examples of radioactive material not covered by the Atomic Energy Act, and, therefore, included within the

[27] Friendly, "Mr. Justice Frankfurter and the Reading of Statutes," in *Benchmarks* 216 (1967). Judge Learned Hand made a related point: "courts * * * recognize that while members deliberately express their personal position upon the general purposes of the legislation, as to the details of its articulation they accept the work of the committees; so much they delegate because legislation could not go on in any other way." *Securities & Exchange Commission* v. *Robert Collier & Co.*, 76 F. 2d 939, 941 (C.A. 2).

[28] H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 131 (1972), 1 Leg. Hist. 753, 818 (emphasis added).

> term "pollutant," are radium and accelerator produced isotopes.

The statutory definition of "pollutant" to which the House Report refers is the same, in all pertinent respects, as that contained in the present Section 502 (6). [29]

During the House consideration of the bill as reported by the House Committee on Public Works, Representative Wolff offered an amendment that would have added to what is now 33 U.S.C. (Supp. III) 1370 [30] an additional paragraph providing in effect that the States would have authority to set limitations on the

[29] The same language was contained in the Senate bill but the Senate Committee Report, in its discussion of the provision, states only that it defined "pollutants" and "has extracted from the Refuse Act [33 U.S.C. 407] the basic formula and added municipal discharges to it * * *." S. Rep. No. 92-414, 92d Cong., 1st Sess. 76 (1971), 2 Leg. Hist. 1419, 1494.

At another point, in discussing a different provision (33 U.S.C. (Supp. III) 1316), the Senate Report states that the Committee did not include in its list of new sources "nuclear fuels processing plants" because the EPA "does not have the technical capability to establish controls for such plants at this time." S. Rep. No. 92-414, *supra*, at 59, 2 Leg. Hist. 1477. The Report then stated that it is expected that EPA will develop "the capability that is required to implement the purpose of this Act." *Ibid.* This of course sheds no light on the question presented here since, with the exception of source, byproduct and special nuclear materials, no one disputes that the Act empowers EPA to control the content (and heat) of effluent discharges from the plants referred to by the Senate Committee and that standards of performance for such controls could be established by EPA, although it has not yet done so. See 33 U.S.C. (Supp. III) 1316.

[30] 33 U.S.C. (Supp. III) 1370 generally provides that the states retain authority to prescribe more stringent discharge limitations regarding "pollutants" than those prescribed under the Act.

discharges of radioactive materials. In introducing and explaining his amendment, Representative Wolff observed that "[i]t does seem strange to me, though, that the bill fails to prohibit the routine discharge of radioactive wastes from nuclear powerplants into the water" (1 Leg. Hist. 544)—a statement indicating that he understood the meaning of the Act to be that stated in the House Report. Representative Wolff argued further that seventeen years had elapsed since the passage of the Atomic Energy Act, that States should have the option of setting standards for nuclear power plants more restrictive than those set "on the Federal level," and that the time had come "to seriously consider standards more stringent than those promulgated by the AEC" (*id.* at 544–545).

The Wolff Amendment was defeated by a 3 to 1 margin (*id.* at 557). During the debate, however, no one disputed Representative Wolff's understanding of the bill itself. Opponents of the amendment, as had Representative Wolff, indicated that the bill did not give the EPA authority to regulate AEC-licensed materials. Representative Stanton stated (*id.* at 554–555):

> The amendment presents the House with a very complex and difficult proposition. It proposes to take authority for the setting of pollution control standards from the AEC and places it in the hands of EPA. For normal operations involving pollution, that control properly belongs under EPA. But atomic energy is a peculiar field. To date, the operation of the atomic energy program has been under the control of the Commission itself. Eventually, such control

> will be delegated to the States as more and more knowledgeable people at the State level become involved in the atomic energy program. That time, however, has not yet arrived. Until we reach that stage it is obvious that the control of which we speak should remain with the Atomic Energy Commission itself, as the committee points out on page 131 of House Report 92–911 which accompanies this bill. For this reason, I would oppose the amendment offered by my distinguished colleague.

Representative Price was just as explicit (*id.* at 556):

> The bill as reported establishes a program of effluent limitations and standards, and section 510 clearly provides that the States may set more restrictive standards should they so desire. The proposed amendment is aimed at two so-called pollutants—radioactive materials and thermal discharges—and seeks to collaterally amend any statute enacted by the Congress relative to them without any specific reference to the statutes that might be affected. As to radioactive materials, the target of the amendment is obvious. It seeks to reverse the decisions of the courts which have held that the Atomic Energy Act of 1954 preempted to the Federal Government, acting through the Atomic Energy Commission, the exclusive jurisdiction to regulate most radioactive materials. Clearly, if such is the will of the House, it should be undertaken only after a thorough examination of the impact of such a decision and it should be done directly by amending the statute involved—the Atomic Energy Act—not collaterally through this legislation. If this amendment had been proposed as

> a piece of original legislation, it would have been referred to the appropriate committee for hearings and evaluation of all the pertinent factors involved in such a decision. I could go on with the explanation of those factors, but this is not the time nor the place for such a consideration in the first instance. This bill is not the appropriate vehicle for amending a major piece of legislation, thoroughly considered in committee and by the Congress, which established at the direction of the Congress a thorough and pervasive regulatory program relative to radioactive materials.

And Representative McCormack, in urging the amendment's defeat, stated as follows (*id.* at 550–551):

> Thousands of man-years of highly qualified work have gone into a study of each radioisotope, its half-life, its disintegration energy levels, its daughters, its biological paths and its biological concentrations and their effects. Nothing exists outside of this meticulous work which remotely compares to it in quality, accuracy or thoroughness with regard to safety considerations. Nothing in any State remotely compares to the work of the Atomic Energy Commission. AEC safety standards are totally consistent in detail with the safety standards for the International Agency for Atomic Energy.
>
> To accept the Wolff-Frenzel amendment would amount to throwing away all of this rational work and substituting for it what is at best semi-informed opinion, and what is many times nothing more than hysteria.

* * * * *

> I would like to conclude by saying that it is obvious from the report by the House Committee on Public Works for this bill, and from the committee report from the other body that this bill does not impact directly upon the Atomic Energy Act of 1954. This bill applies only to radioactive materials not covered by the Atomic Energy Act of 1954 and, as such, the amendment is not relevant to this bill at all.

Two points about this debate are especially significant. First, the language we have quoted from the House Report regarding the type of radioactive materials covered by the Act was cited and relied upon by the House Members, which makes it all the more persuasive since the Report did not, in Judge Friendly's words, represent the statute's meaning to just a "few legislators." Second, and just as important, during the debate no one on either side suggested that the bill itself would allow regulation of AEC-licensed materials.[31]

[31] In a later colloquy, Representatives Harsha, Holifield and Jones (*id.* at 587–588) repeated that "radioactive materials," as used in the Act, did not refer to material within the jurisdiction of the AEC. The next day, Representative Frenzel, a cosponsor of the defeated Wolff Amendment, expressed the opposite view (*id.* at 745–746). However, Representative Frenzel had stated during the debate on the Wolff Amendment that Representative Wolff's introductory statement was "exactly correct" (*id.* at 549) and, as quoted in the text (p. 40, *supra*), Representative Wolff had indicated that the bill did not govern discharges of AEC-licensed materials from nuclear power plants. Whether Representative Frenzel's later remarks were what has been termed "manufactured" legislative history is not important (see Friendly, *supra*, at 216 n. 114); his remarks lack force in any event in light of his apparent shift of position after the defeat of the amendment that was proposed to bring about the result he later claimed the bill itself achieved.

In the Senate also, the question arose whether AEC-licensed materials would, under the Act, be regulated as well by EPA. Noting that the definition of "pollutant" in Section 502(f) of the Senate bill included "radioactive materials," Senator Pastore asked the bill's sponsor, Senator Muskie, "Does this measure that has been reported by the committee *in any way affect* the existing law, that is, the existing Atomic Energy Act of 1954, insofar as the regulatory powers of the AEC are concerned with reference to radioactive material?" (2 Leg. Hist. 1265–1266) (emphasis added). The following exchange then took place (*id.* at 1266):

> Mr. MUSKIE. It does not; and it is not the intent of this act to affect the 1954 legislation.
>
> Mr. PASTORE. In other words, this bill does not change that feature of the Atomic Energy Act in any regard?
>
> Mr. MUSKIE. That is correct.
>
> Mr. PASTORE. I thank the Senator.
>
> Mr. MUSKIE. May I say in addition, that legislation dealing with the setting of effluent limitations as they involve nuclear powerplants is now pending in the courts. The Senator is aware of that litigation.
>
> For example, a recent decision of the U.S. Court of Appeals for the Eight Circuit, in the case of Northern States Power and Light versus Minnesota,[32] raises the issue. I would like to

[32] The case referred to by Senator Muskie is *Northern States Power Co.* v. *Minnesota*, 447 F. 2d 1143 (C.A. 8), which this Court later affirmed, 405 U.S. 1035. The court of appeals there held that the state could not require a nuclear power plant to

> point out that the committee considered speaking specifically to that decision, but chose to remain silent so as not to prejudice the decision or any appeal from it.
>
> Mr. PASTORE. Yes. As a matter of fact, that decision held that the Federal Government did preempt in this field under existing law. That is the opinion, and we hope this legislation does not change that opinion in any way, and does not affect existing law. That is all I am concerned with.
>
> Mr. MUSKIE. The Senator is correct in his evaluation of the legislation on that point.

While respondents have suggested that this exchange indicates only that "the FWPCA does not alter the licensing authority of the AEC" (Br. in Opp. 16),[33] this is hardly consistent with Senator Muskie's assurance that the new Act would not "in any way affect" the licensing power of what is now the NRC over nuclear materials, a power that was then exclusive. Indeed, respondents themselves recognize that their interpretation of the Act would affect the NRC's licensing authority under the Atomic Energy Act since NRC, according to respondents, would have to

obtain a state permit for the discharge of source, byproduct and special nuclear materials since these were within the exclusive regulatory authority of the AEC under the Atomic Energy Act, which the court described as a pervasive regulatory scheme. 447 F. 2d at 1152–1154.

[33] Respondents also refer to a discussion with Senator Buckley, in which Senator Muskie said that "with respect to the subject matter which the Senator has raised" the AEC must abide by EPA effluent limitation controls (1 Leg. Hist. 198). The subject matter raised was thermal pollution.

issue licenses conforming to permits issued under the FWPCA (*id.* at 12)."

As noted previously, the Conference Committee retained the language in the House and Senate bills defining "pollutants" to include "radioactive materials" and stated only in this regard that the final version was "the same" as the House and Senate versions. S. Conf. Rep. No. 92–1236, 92d Cong., 2d Sess. 143 (1972), 1 Leg. Hist. 326. Significantly, the Conference Report indicated no disagreement about whether AEC-licensed materials were to be covered by the Act. The

[34] Other remarks of Senator Muskie, upon which respondents rely (Br. in Opp. 8–9), are not inconsistent with his assurances to Senator Pastore. Senator Muskie did state that the EPA "is the sole Federal agency specifically charged with comprehensive responsibility to regulate the discharge of *pollutants* into the waters of the United States" (1 Leg. Hist. 183) (emphasis added); but, as the dialogue with Senator Pastore reveals, Senator Muskie agreed that AEC-licensed materials are not "pollutants" within the terms of the Act.

For the same reason, it is not significant that the Senate Report mentioned no specific exclusion of AEC-regulated materials similar to that in the House Report. That omission, rather than indicating any conclusion that AEC-regulated materials *should* be considered pollutants within the FWPCA, showed that the Senate Committee wished to abide by the judicial judgment concerning the allocation of state and federal responsibility in that area. Since, as noted above, the FWPCA is based on the primary state responsibility for pollution control, it may be that if this Court had concluded in *Northern States* that the states could regulate radioactive effluents from nuclear plants, the above exchange would be some indication that the Senate intended to treat these effluents as "pollutants." But *Northern States* held that the responsibility under the Atomic Energy Act was exclusive, and Senator Muskie's remarks indicate the Senate Committee intended no change in that result.

reason is apparent from the following remarks of Representative Harsha, a ranking Member of the Conference Committee, in response to a question from Representative Anderson, who expressed his understanding that the Act would not give EPA authority to regulate AEC-licensed materials[35] (1 Leg. Hist. 226–227):

> The gentleman is quite correct. The conference report does not change the original intent as it was made clear in the colloquy between Senators Muskie and Pastore in the course of the debate in the other body. I also note that an amendment to H.R. 11896 was offered on March

[35] Representative Anderson stated in full (*id.* at 226): "Mr. Speaker, I note that pollutant is defined in section 502(6) so as to include radioactive materials. This was also true of both S. 2770 as passed by the Senate and the House so there has been no change in this respect. S. 2770 as passed by the Senate did not amend the Atomic Energy Act as interpreted in Northern States Power against Minnesota and as affirmed by the Supreme Court with respect to State authority over nuclear materials and facilities, as was made clear by a colloquy between Senators Muskie and Pastore in the course of debate on the measure, and in the House an amendment to H.R. 11896 intended to give States authority beyond that allowed by the Atomic Energy Act was rejected. The conferees' statement does not indicate that any change in this matter is intended—indeed section 101 (f), declaring a national policy to prevent needless duplication and unnecessary delays at all levels of government, reinforces the earlier House and Senate action on this matter. Nevertheless, I should like to confirm my understanding that the bill as reported by the conferees is not intended to change the careful division of authority between the States and the Federal Government over nuclear materials and facilities under the Atomic Energy Act as enunciated in Northern States Power against Minnesota and affirmed by the Supreme Court."

28, 1972, which would have overturned the Northern States Power against Minnesota case.

The distinguished gentleman from California (Mr. Holifield) spoke in opposition to the amendment and pointed out the necessity of not changing the careful division of authority between the States and the Federal Government over nuclear materials and facilities as enunciated in the Northern States case. The amendment was defeated by a 3-to-1 vote of the House.

I can say to the gentleman from Illinois that the managers in no way detracted from the intent of the language in H.R. 11896. I also note that the Committee on Public Works in its report on H.R. 11896 stated on page 131 that the term "pollutant" as defined in the bill includes "radioactive materials." These materials are not those encompassed in the definition of source, byproduct, or special nuclear materials as defined by the Atomic Energy Act of 1954, as amended, and regulated pursuant to that act. "Radioactive materials" encompassed by this bill are those beyond the jurisdiction of the Atomic Energy Commission. Examples of radioactive materials not covered by the Atomic Energy Act, and, therefore, included within the term "pollutant" are radium and accelerator produced isotopes. This language adequately reflects the intent of the managers of the conference report.

Again, no one indicated any disagreement with this view and the House proceeded to consider other sections and to agree with the Conference Committee's report (*id.* at 276).

We should also note that in 1973, during the House debates on the Energy Reorganization Act of 1974 (Pub. L. 93-438, 88 Stat. 1233-1254), the House rejected an amendment that would have in effect redefined "radioactive materials" to include NRC-licensed material and transferred from the NRC to the EPA authority to establish emission limitations for such materials. 119 Cong. Rec. H11749-H11750 (daily ed., December 19, 1973).

III

CONGRESS COULD NOT HAVE INTENDED TO CREATE THE REDUNDANT REGULATORY SCHEME ORDERED BY THE COURT BELOW

While we believe the foregoing discussion firmly supports our position that the Act does not require the EPA to regulate NRC-licensed materials, that this is the correct interpretation is even more apparent from an examination of the Atomic Energy Act and the FWPCA and the regulatory system that would exist under a contrary construction.

An express purpose of the Atomic Energy Act was to provide for "a program to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with * * * the health and safety of the public." 42 U.S.C. 2013(d). To ensure that this statutory goal was achieved, Congress directed the AEC to establish all necessary rules and regulations to govern the possession and use of special nuclear material, source material and byproduct materials. 42

U.S.C. 2201(b).[36] In response to this directive, the AEC—now the NRC—has promulgated a comprehensive body of regulations establishing detailed safety and licensing criteria. 10 C.F.R. Parts 20–100.[37]

As this Court stated in *Power Reactor Development Co.* v. *Electricians Union,* 367 U.S. 396, 404, the Atomic Energy Act "clearly contemplates that the Commission shall by regulation set forth what the public safety requires as a prerequisite to the issuance of any license or permit under the Act." Accordingly, the Commission has established limits for releases of radioactivity to the environment. 10 C.F.R. Part 20, Appendix B.[38] But these effluent discharge limits can be attained only through specific NRC regulatory requirements which deal with such matters as plant siting and design, effluent monitoring, security, and environmental protection. 10 C.F.R. Parts 50, 51, 71, 73 and 100.

In the course of establishing liquid effluent requirements for a particular facility, the NRC must, of course, consider many other safety requirements which

[36] "Congress * * * enact[ed] a regulatory scheme which is virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives." *Siegel* v. *Atomic Energy Commission*, 400 F.2d 778, 783 (C.A.D.C.)

[37] The Joint Committee on Atomic Energy frequently examines the adequacy of these procedures. *E.g.*, Hearings on AEC Licensing Procedure and Related Legislation before the Subcommittee on Legislation of the Joint Committee on Atomic Energy, 92d Cong., 1st Sess. (1971).

[38] In addition to enforcing the Part 20 release limits, the NRC requires that nuclear facilities be designed to ensure that levels of radioactive materials in effluents are as low as practicable. See pp. 21–25, *supra.*

must be satisfied before a nuclear facility may be licensed. Decisions regarding the type and amounts of radioactive waste that may be discharged from a plant, and the extent to which any of these discharges may be to the air or water, necessarily must take into account the design and operation of the plant. All these decisions together must produce a safe and efficient plant, with discharges which will not adversely affect either the public health and safety or the environment. As the court stated in *Northern States Power Co.* v. *Minnesota, supra,* 447 F.2d at 1153 affirmed, 405 U.S. 1035, "regulation of the radioactive effluents discharged from a nuclear power plant is inextricably intertwined with the planning, construction and entire operation of the facility."[39] Accordingly, it would be inconsistent with the legislative policy expressed in the Atomic Energy Act to conclude that the authority to regulate such discharges is now the primary responsibility of EPA[40] and it would be sur-

[39] The agreed statement of facts submitted to the district court in the case was to the same effect. 447 F.2d at 1149 n. 6.

[40] The temperature of the effluent can be lowered by cycling it through cooling towers or retaining it in cooling ponds before it is discharged into national waters. Thus, control over the heat of effluents is not so closely tied to the planning, construction and operation of the plant, and the fact that such controls are within the jurisdiction of EPA under the FWPCA is not inconsistent with the intent of the Atomic Energy Act. Despite respondent's suggestion (Brief in Opp. 13), the fact that other agencies regulate the transportation and packaging of radioactive materials concurrently with the NRC is even less significant. Such regulations, designed to assure the integrity of the packaging and protect transportation facilities, do not have any significant impact on the planning, construction, or operation of nuclear facilities.

prising indeed if Congress contemplated such a result without careful consideration of the matter.

This is not to say that EPA has no responsibilities in this area. The Environmental Protection Agency was established by Reorganization Plan No. 3 of 1970, 84 Stat. 2086, 5 U.S.C. App., p. 609. That plan transferred to the EPA "[t]he functions of the Atomic Energy Commission under the Atomic Energy Act of 1954, as amended* * * [which] consist of establishing generally applicable environmental standards for the protection of the general environment from radioactive material. As used herein, standards mean limits on radiation exposures or levels, or concentrations or quantities of radioactive material, in the general environment outside the boundaries or locations under the control of person possessing or using radioactive material" (Sec. 2(a)(6), 84 Stat. 2088, 5 U.S.C. App., p. 610) In his message accompanying the Plan, the President emphasized that the AEC was to "retain the responsibility for the implementation and enforcement of radiation stands through its licensing authority." 5 U.S.C. App., p. 612. Thus, the lines of authority were clearly drawn: EPA was to set generally applicable radiation standards, limiting the total amount of permissible radiation

[41] See EPA Proposed Standards for Environmental Radiation Protection for Nuclear Power Operations, 40 Fed. Reg. 23419 (May 29, 1975).

in the environment from major categories of sources,[41] while the AEC was to prescribe the limitations applicable to discharges of licensed materials from particular sources which contribute to the total."[42]

This division of authority requires close cooperation between the two agencies, lest AEC license discharges resulting in degradation of the environment in excess of standards established by EPA, or EPA establish standards so stringent that they would require the AEC to impose unattainable limitations on discharges from nuclear facilities. See, *e.g.*, AEC–EPA Memorandum of Understanding concerning environmental protection and control of radiation effects, 38 Fed. Reg. 24936 (September 11, 1973).[43] But carefully avoids, in the words of the FWPCA, the "needless

[42] See also the statement by the President's Director of the Office of Management and Budget on December 7, 1973. Ash memorandum, attached to court of appeals brief of Arkansas, *et al.*, pp. 35–36. Accord, 119 Cong. Rec. H11749–H11750 (daily ed. December 19, 1973).

[43] Cf. Executive Order 11752, 3A C.F.R. (1973 Comp.), pp. 240, 244, providing for the prevention, control, and abatement of environmental pollution at federal facilities, in furtherence of, *inter alia*, the FWPCA. The order requires all federal agencies to assure that their facilities conform to: "Federal guidance on radiation and generally applicable environmental radiation standards promulgated or recommended by the Administrator [of EPA], and adopted in accordance with the Atomic Energy Act, as amended (42 U.S.C. 2011), and rules, regulations, requirements, and guidelines on discharges of radioactivity as prescribed by the Atomic Energy Commission."

duplication and unnecessary delays" (33 U.S.C. (Supp. III) 1251(f)) which would be involved if both agencies attempted to license the discharge of the same materials to achieve the same ends.

No discernible public policy would be served by requiring both NRC and EPA to regulate the same discharges. Congress knew full well that regulation of the same subject by separate federal agencies, and the consequent problems that might arise from varying requirements, each aimed at achieving the same goal in a different way,[44] would be particularly undesirable in regard to radioactive material used, produced and discharged from nuclear facilities. Cf. *Gordon* v. *New York Stock Exchange, Inc.*, No. 74–304, decided June 26, 1975, slip op. 29–30. Both the comprehensive regulations of special nuclear, source and byproduct materials required by the Atomic Energy Act and the

[44] Although the Atomic Energy Act provides for limited state cooperation in the control of NRC-licensed materials (42 U.S.C. 2021), the states are precluded from exercising regulatory controls over the discharge of NRC-licensed materials from production or utilization facilities (terms which include nuclear power plants). 42 U.S.C. 2021(c); *Northern States Power Co.* v. *Minnesota*, *supra*. This limitation reflects a specific Congressional judgment when the new section was added to the Atomic Energy Act in 1959 (73 Stat. 688) that the control of radioactive effluents from production and utilization facilities should remain with the agency responsible for licensing the design, construction, and operation of these facilities.

In contrast, the FWPCA emphasizes the "primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." 33 U.S.C. (Supp. III) 1251(b).

regulation of pollutants under the FWPCA have as a primary purpose the protection of the public health and safety.[45] Indeed, under both, a basic approach followed by the agencies concerned is to require the use of the best technology-related standards to control materials in effluent discharges. See pp. 26–27, *supra*. In addition, like all federal agencies, NRC and ERDA must consider the environmental effects of their activities. 42 U.S.C. 4331 *et seq.*; *Calvert Cliffs' Coord. Com.* v. *Atomic Energy Commission*, 449 F. 2d 1109 (C.A.D.C.).

If the EPA decided under a redundant regulatory system such as that ordered by the court below, to impose the same standards as NRC, the result would simply be unnecessary duplication of effort.[46] In the absence of any showing that NRC review is inadequate (Pet. App. 21a), or that Congress believed it to be so (1 Leg. Hist. 544–557; 119 Cong. Rec. H11749–H11750 (daily ed., December 19, 1973)), the FWPCA should not be interpreted to require such an unreasonable result. Cf. *United States* v. *American Trucking Ass'ns*, *supra*, 310 U.S. at 543.

[45] The Atomic Energy Act repeatedly emphasizes the requirement for consideration of the public health and safety. See 42 U.S.C. 2013(d); 2073(b); 2073(e)(7); 2093(b); 2099; 2111; 2133(b); 2134; 2201(b); 2232(a); 2236(c).

[46] Moreover, it is at best inefficient to separate decisions concerning the amount of discharge of radioactive materials into water from decisions concerning the design of the facility and its discharges of airborne and solid radioactive materials, all of which are interrelated. Cf. note 40, *supra* re thermal discharges).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Supreme Court of the United States

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No. 74-1270

RUSSELL TRAIN, Administrator of the Environmental Protection Agency, *et al.*,
Petitioners,

VS.

COLORADO PUBLIC INTEREST RESEARCH GROUP, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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IN THE

Supreme Court of the United States

No. 74-1270

October Term, 1975

RUSSELL TRAIN, Administrator of the Environmental Protection Agency, *et al.*,
Petitioners,

vs.

COLORADO PUBLIC INTEREST RESEARCH GROUP, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR THE RESPONDENTS

STATEMENT OF THE CASE

Respondents believe that petitioners' statement of the case omits information which is essential to a full understanding of the issues presented for review, and therefore provide the following supplementary statement.

This case involves the interpretation of a single term —"pollutant"—in the Federal Water Pollution Control Act Amendments of 1972 (FWPCA), 86 Stat. 816, 33

U.S.C. § 1251 *et seq.* (Supp. II, 1972). The statutory definition of "pollutant" explicitly includes "radioactive materials" without qualification or limitation. 33 U.S.C. § 1362(6) (Supp. II, 1972). The FWPCA further defines the term "pollution" to mean "the man-made or man-induced alteration . . . of the radiological integrity of water." 33 U.S.C. § 1362(19) (Supp. II, 1972), and explicitly regulates radioactive materials subject to the Atomic Energy Act. (AEA).[1] *See* 33 U.S.C. § 1311(f) (Supp. II, 1972).

These provisions were the product of a careful and intensive congressional effort to draft a truly comprehensive statute governing all aspects of water pollution. The Senate Subcommittee on Air and Water Pollution of the Committee of Public Works held hearings and deliberated more than two years before drafting and reporting an original bill, S.2770, on October 28, 1971.

[1]68 Stat. 919, 42 U.S.C. § 2011 *et seq.* (1970). Pursuant to the Energy Reorganization Act of 1974, 88 Stat. 1233, 42 U.S.C.A. § 5801 *et seq.* (Supp. Feb., 1975), the Nuclear Regulatory Commission (NRC) succeeded to the regulatory functions of the Atomic Energy Commission (AEC); the new Energy Research and Development Administration (ERDA) assumed responsibility for operating the government's nuclear facilities. The Energy Reorganization Act provides that NRC's licensing authority over commercial nuclear facilities and ERDA's operational authority over government nuclear facilities shall continue to be subject to the provisions of the Atomic Energy Act. 42 U.S.C.A. §§ 5841(f), 5874, 5871(a) (Supp. Feb., 1975). Therefore, to refer to radioactive materials which are defined by the Atomic Energy Act as source, by-product and special nuclear material and which are subject to NRC's jurisdiction in connection with commercial nuclear operations and subject to ERDA's authority in connection with the government's operations, this brief will use the term "AEA-regulated" radioactive materials. This term is appropriate since both NRC and ERDA are governed by the statutory standards set out in the Atomic Energy Act.

2 Leg. Hist. 1415.[2] The full Senate approved the bill on November 2, 1971.

The House Committee on Public Works also conducted extensive hearings on water pollution legislation, and on March 11, 1972 reported a new bill, H.R. 11896, based on the Senate-passed legislation. 1 Leg. Hist. 753. The full House adopted the bill on March 29, 1972.

To resolve the differences in the Senate and House versions of the bill, a Conference Committee was convened and held 39 meetings during a three-month period. The Conference bill was passed overwhelmingly by both the House and Senate, and the bill became law on October 18, 1972, when Congress overrode the veto of President Nixon.[3]

As we fully discuss later, the legislative history establishes that both the Senate bill and the Conference bill —which was ultimately enacted into law—intended to regulate all "radioactive materials" including those subject to the Atomic Energy Act. Although some members of the House supported an exemption from the FWPCA for AEA-regulated radioactive materials, they could not attract sufficient support even to write this exclusion into the House bill.

[2]Leg. Hist. refers to the Committee Print, A Legislative History of the Water Pollution Control Act Amendments of 1972 Together with a Section-by-Section Index, prepared by the Environmental Policy Division of the Congressional Research Service of the Library of Congress, 93rd Cong., 1st Sess. (1973).

[3]The FWPCA passed the House by a vote of 366-11, 1 Leg. Hist. 276, and the Senate by 74-0. 1 Leg. Hist. 222. The House overrode the President's veto by a vote of 247-23, 1 Leg. Hist. 109, and the Senate voted 52-12 to override. 1 Leg. Hist. 135.

Under the new law, the Administrator of the Environmental Protection Agency (EPA) was charged with the responsibility of administering the FWPCA, 33 U.S.C. § 1251(d) (Supp. II, 1972), including *inter alia*, implementation of the National Pollutant Discharge Elimination System (NPDES), 33 U.S.C. § 1342 (Supp. II, 1972). The NPDES established a permit system as the basic mechanism in the FWPCA for reducing and eliminating pollution by enforcing effluent limitations and water quality standards applicable to the discharge of pollutants into the navigable waters.

On April 9, 1973, EPA published a public notice announcing its intent to issue a NPDES permit to the Public Service Company of Colorado for its Fort St. Vrain Nuclear Generating Station. The proposed St. Vrain permit, Appendix, at 21, included limitations on the discharge of "radioactive materials," specifically providing for the "control of liquid radioactive waste," Appendix, at 29, and "radiation monitoring." Appendix, at 34.

However, before the St. Vrain permit could be issued, EPA published a new public notice on July 6, 1973, which did not contain any limitations on the discharge of liquid radioactive waste from the Fort St. Vrain facility. Appendix, at 39. This public about-face in the St. Vrain proceeding—reflected in the record in the present case—was apparently due to the adoption of regulations to implement the NPDES. 38 Fed. Reg. 13528 (May 22, 1973). In § 125.1(x) of these regulations the Administrator—ostensibly on the basis of

"legislative history"—excluded from regulation under the FWPCA all radioactive materials subject to the Atomic Energy Act. 38 Fed. Reg. 13529-30.[4]

The creation of this exemption has had two effects. First, it eliminated from regulation under the FWPCA the vast majority of "radioactive materials" discharged into water, rendering unenforceable the Act's goal of protecting the "radiological integrity of water." Second, it has left the authority to control radioactive discharges split between the Energy Research and Development Administration (ERDA) which operates government nuclear facilities, and the Nuclear Regulatory Commission (NRC) which licenses commercial nuclear facilities.[5] In addition, NRC's activities in setting effluent limitations must, somewhat awkwardly, be coordinated with EPA's authority to set generally applicable environmental radiation protection standards. *See, e.g.*, 40 Fed. Reg. 23419 (May 29, 1975).

The decision to limit the jurisdiction of the FWPCA was apparently the result of an inter-agency struggle

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[4]The exclusion was supported by the following comment which was appended to § 125.1(x):

> The legislative history of the [FWPCA] reflects that the term 'radioactive materials' as included within the definition of 'pollutant' in section 502 of the Act covers only radioactive materials which are not encompassed in the definition of source, by-product, or special nuclear materials as defined by the Atomic Energy Act of 1954, as amended, and regulated pursuant to the latter Act. Examples of radioactive materials not covered by the Atomic Energy Act and, therefore, included within the term 'pollutant' are radium and accelerator produced isotopes. (H.R. Rep. 92-911, 92d Cong. 2d Sess., 131, March 11, 1972; 117 Cong. Rec. 17401, daily ed., November 2, 1971; 118 Cong. Rec. 9115, daily ed., October 4, 1972.)

[5]See note 1, *supra*.

between EPA and the Atomic Energy Commission (AEC),[6]—a struggle which was acknowledged by two inter-agency memoranda of understanding later in 1973. 38 Fed. Reg. 24936 (Sept. 11, 1973); 38 Fed. Reg. 32965 (Nov. 29, 1973); *see also* 40 Fed. Reg. 19439 n. 3 (May 5, 1975). Indeed, the conflict between the AEC and the EPA over the extent of EPA's authority over individual types of nuclear facilities (which extended beyond EPA's authority under the FWPCA) was resolved ultimately by President Nixon in favor of the AEC. *N.Y. Times,* Dec. 11, 1973, at 1, col. 4; 4 *Environment Reporter* 1370 (1973).[7] In terms of the FWPCA, EPA itself has acknowledged that its decision to exclude radioactive materials from coverage under the FWPCA was "made at AEC's request . . . *in spite of the rather clear mandate of FWPCA for radioactive materials.*"[8]

Furthermore, EPA decided not to request the Solicitor General to petition this Court for review of the

[6]Throughout this brief, reference is made to the Nuclear Regulatory Commission (NRC) and to the Energy Research and Development Administration (ERDA) which succeeded to the Atomic Energy Commission's (AEC) functions. *See* note 1, *supra.* Specific references to the AEC are used when the context so requires.

[7]*See* Memorandum from Roy Ash, President's Director of Management and Budget, to Administrator Train and Chairman Ray (Dec. 7, 1973), attached to Brief Amicus Curiae on behalf of Arkansas *et al.*, filed in the Tenth Circuit.

[8]This statement appears in EPA's discussion of its reasons for issuing general radiation standards for the uranium fuel cycle:

> Issuance of these standards also would assist in the defense of a state or environmenalist suit against the Administrator challenging EPA's decision to exclude radioactive materials from the permit program under the FWPCA. ***This decision was made at AEC's request to avoid duplication of ongoing AEC plant licensing activities, in spite of the rather clear mandate of FWPCA for radioactive materials.*** It was made based on EPA's plans to issue these standards for the uranium fuel cycle under authority separate from the FWPCA.

U.S. Environmental Protection Agency, "Draft Statement of Considerations—Environmental Radiation Standards for the Uranium Fuel Cycle" 41 (September, 1973) (emphasis added). Distributed to interested persons at the time it was issued, the "Statement of Considerations" was lodged with the Tenth Circuit in support of the Brief Amicus Curiae on Behalf of Arkansas, *et al.*

Tenth Circuit's decision. Review was apparently sought only at the request of NRC. 16 *Nucleonics Week,* Jan. 16, 1975, at 9, and Jan. 23, 1975, at 5. Thus, in this case the Court is asked to create a significant exception to this detailed statute which is sought not by the agency charged with the enforcement of the FWPCA, but by an agency seeking to protect its own jurisdiction.

Respondents will demonstrate in this brief the validity of the Tenth Circuit's conclusion that this exception is consistent neither with the unambiguous language of the FWPCA, nor with the Act's legislative history. *See Colorado Public Interest Research Group v. Train,* 507 F.2d 743 (10th Cir. 1974) (McWilliams, J.).

SUMMARY OF ARGUMENT

This Court is asked to decide whether a major—and increasingly important—type of pollution, namely radioactive materials, is subject to the FWPCA's comprehensive regulatory program designed to restore and maintain our nation's vital water resources. The FWPCA prohibits the "discharge" of any "pollutant" from any "point source" into the "navigable waters"

except in compliance with specified statutory provisions. The FWPCA defines the term "pollutant" to include "radioactive materials" without limitation or exception. 33 U.S.C. § 1362(6) (Supp. II, 1972). The natural meaning of the phrase "radioactive materials", in both its popular and technical sense, refers generically to all radioactive materials.

This unambiguous statutory language deserves particular weight in the present case since Congress gave the FWPCA "microscopic scrutiny", and Senator Muskie flatly asserted Congress tried "to write into law as clearly as possible the intent of Congress," 1 Leg. Hist. 164. In addition, the FWPCA's broad purpose to control water pollution, the comprehensive nature of its regulatory scheme, and explicit congressional statements as well as relevant canons of statutory construction require this Court to give a broad interpretation to key provisions of the FWPCA, such as the definition of "pollutant."

Yet petitioners seek a broad exemption that would remove from the FWPCA AEA-regulated radioactive materials which represent the vast majority of radioactive materials discharged into water by point sources, thereby reducing the FWPCA's reference to these materials to an empty gesture. Elsewhere, when Congress has sought to create an exception of this magnitude, it has done so in statutory language. In addition, the exemption sought by petitioners would create by implication a major exception despite the fact that Congress wrote other exceptions into the definition of "pollutant." When a statute contains

specific exceptions, no other exceptions are to be read into the statute.

Further, other provisions of the FWPCA clearly apply to AEA-regulated radioactive materials. Congress defined "pollution" to mean the "man-made or man-induced . . . alteration of the radiological integrity of water." 33 U.S.C. § 1362(19) (Supp. II, 1972). In addition, the FWPCA explicitly prohibits the discharge of highly concentrated forms of radioactive materials subject to AEA regulation. 33 U.S.C. § 1311(f) (Supp. II, 1972). Finally, the FWPCA specifically requires EPA to establish "national standards of performance" to reduce pollution from newly constructed nuclear "steam electric power plants." 33 U.S.C. § 1316(b)(1)(A) (Supp. II, 1972).

In light of the FWPCA's unequivocal language, resort to legislative history is inappropriate in the instant case, particularly since petitioners seek to use legislative history to create ambiguity, not to solve it. Even so, an objective reading of the full legislative record establishes Congress' intent to regulate all radioactive materials under the FWPCA.

The Senate Committee wrote an extremely broad definition of pollutant intended to require an NPDES permit for the addition of "any" material into navigable waters, and made explicit reference in its Report to the regulation of AEA-regulated nuclear fuels processing plants. 2 Leg. Hist. 1477. Senator Muskie himself indicated on the floor of the Senate that the Senate Committee believed the Senate bill applied to AEA-regulated radioactive materials. 2 Leg. Hist. 1266. In

the House, supporters of the exemption were unable to write a specific exemption into the House bill. In addition, despite the language in the House Report, the House debate reveals considerable confusion over whether the FWPCA applied to AEA-regulated materials. *See, e.g.,* 1 Leg. Hist. 746. And the debate on a proposed amendment indicates that most Representatives assumed that the phrase "radioactive materials" included AEA-regulated radioactive materials. 1 Leg. Hist. 542-57.

The Conference Committee's bill substituted a new definition of pollutant which revised in several respects both the House and Senate definitions of "pollutant," even deleting two House-passed exceptions. Having given the definition careful scrutiny, the Conference Committee included the term "radioactive materials" without exception or qualification and made no reference to any exemption in the Conference Report. 1 Leg. Hist. 326-27. During the Senate debate on the Conference's bill, numerous references were made to the AEC as an example of an agency whose authority in setting effluent limitations would yield under the FWPCA to EPA. 1 Leg. Hist. 183, 198, 202, 205. Thus, the Conference Committee adopted a comprehensive water pollution control statute intended to cover radioactive materials in the same fashion as any other waste material, and the Senate adopted the Conference bill without even a hint of an exemption for AEA-regulated materials.

Regulation of all radioactive materials under the FWPCA ends, not creates, redundant regulation.

It will permit EPA to utilize its extensive radiation protection expertise to formulate effluent limitations and eliminate current overlapping authority among EPA, ERDA, and NRC.

ARGUMENT

I. THE COMPREHENSIVE FWPCA EXPLICITLY REGULATES ALL RADIOACTIVE MATERIALS DISCHARGED INTO WATER AND ANY OTHER INTERPRETATION WOULD MAKE THE ACT INTERNALLY INCONSISTENT.

The present case draws into question the breadth of coverage of the FWPCA. The materials which the FWPCA regulates are defined as "pollutants," and the Act explicitly defines pollutant to include "radioactive materials." However, the government—petitioner in this Court—argues that an exception should be read into this statutory term to exempt radioactive materials subject to the Atomic Energy Act.

Thus, the Court is asked to decide whether a major —and increasingly important—type of pollution, namely radioactive materials, is subject to the FWPCA's comprehensive and carefully drafted control system designed to reduce water pollution. Petitioners argue—with no support in the statute or in the legislative history considered in context—that the FWPCA was intended to be comprehensive in all respects except one—radioactive materials—and that the general obligation imposed on ERDA and NRC to protect the public health and safety (by a statute

enacted more than 20 years ago to promote nuclear energy) should prevail over the detailed provisions and standards set out in the FWPCA to control water pollution.

The interpretation of the provisions of the FWPCA, and particularly the Act's definition of pollutant, must begin with an analysis of (1) the Act's purposes and (2) the actual language of the statute—analyses notably absent from the petitioners' presentation of the case.

A. The FWPCA Creates A Comprehensive, Detailed Regulatory Mechanism To Control Water Pollution.

As this Court has repeatedly emphasized:

> [It is] fundamental that a section of a statute should not be read in isolation from the context of the whole Act, and in fulfilling our responsibility in interpreting legislation 'we must not be guided by a single sentence, but [should] look to the provisions of the whole law and to its object and policy.'
>
> *Richards v. United States,* 369 U.S. 1, 11 (1962).

When the success of a statute's policy depends in large measure on the interpretation given the provision in question, this canon of interpretation assumes particular importance. And in this case, the definition of the term "pollutant" lies at the very heart of the regulatory mechanism that the FWPCA creates.

The FWPCA establishes a unified regulatory system designed to restore and maintain our nation's vital

water resources.[9] 33 U.S.C. § 1251(a) (Supp. II, 1972); *See Train v. City of New York,* 420 U.S. 35, 37 (1975) (White, J.); *United States v. Ashland Oil and Transportation Company,* 504 F.2d 1317, 1324-25 (6th Cir. 1974); *Scenic Hudson Preservation Conference v. Callaway,* 370 F. Supp. 162, 169-70 (S.D.N.Y. 1973), *aff'd per curiam,* 499 F.2d 127 (2nd Cir. 1974); *Natural Resources Defense Council v. Train,* ..... F. Supp. ....., 7 E.R.C. 1881 (D.D.C. 1975); *Natural Resources Defense Council v. Callaway,* 392 F. Supp. 685, 686 (D.D.C. 1975); *United States v. Holland,* 373 F. Supp. 665, 668 (M.D. Fla. 1974).

This Court recently recognized that the FWPCA "was intended . . . to achieve an early solution of what

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[9]The FWPCA's Declaration of Goals and Policy states that:

> The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—
>
> (1) it is the national goal that the discharge of pollutants into the navigable water be eliminated by 1985;
>
> (2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;
>
> (3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;
>
> (4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;
>
> (5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State; and
>
> (6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans.
>
> 33 U.S.C. § 1251(a) (Supp. II, 1972)

was deemed an urgent problem." *Train v. City of New York, supra,* at 45. Indeed, the degree of congressional concern over water pollution and the all-encompassing scope of the FWPCA's regulatory scheme was repeatedly stated in Congress and is consistently and repeatedly reflected in the Act's provisions. Senator Eagleton, a member of the Conference Committee, stated during the Senate consideration of the Conference Report:

> If one word best describes the Federal Water Pollution Control Act Amendments of 1972, it is the word "comprehensive". It is comprehensive in its coverage of water pollution sources; it provides a broad-gaged but tightly knit programmatic attack on water pollution. . . .
>
> 1 Leg. Hist. 218.

Representative Dorn, one of the co-authors of the FWPCA, during the House debate on overriding the President's veto of the Act commented: "[T]he clean water bill now before Congress is the most far-reaching environmental improvement bill in history. This is bipartisan legislation, and it passed both bodies by overwhelming votes." 1 Leg. Hist. 109. And as Senator Muskie, the FWPCA's primary author, stated during the Senate's consideration of the Conference Report:

> Our planet is beset with a cancer which threatens our very existence and which will not respond to the kind of treatment that has been prescribed in the past. The cancer of water pollution was engendered by our abuse of our lakes, streams, rivers, and oceans; it has thrived on our half-hearted attempts to control it; and like any other disease, it can kill us. We have ignored this cancer for so long that the romance of environmental concern is already fading in the shadow of the grim realities of lakes, rivers, and bays where all forms of life have been smothered by untreated wastes, and oceans which no longer provide us with food.
>
> 1 Leg. Hist. 161-62.

To achieve the FWPCA's primary objective of the elimination of water pollution by 1985, the Act establishes a specific and elaborate regulatory scheme. This scheme involved a shift in the government's pollution control efforts away from merely setting ambient water quality standards to the mechanism of setting specific effluent limits. In enacting this shift, Congress sought to achieve two major objectives. First, direct limits on the release of pollutants would provide more effective control. But secondly—and perhaps more importantly—the process of setting effluent limits would provide the basis for the government to require polluters to develop the technology to control the release of pollution. *See Natural Resources Defense Council v. Train,* 510 F.2d 692 (D.C. Cir. 1974).

To stimulate pollution control technology, the FWPCA created a phased approach, setting deadlines far in advance, for achieving gradually more stringent control levels.

> Your committee has placed before you a tough bill. This body and this Nation would not have it be otherwise. Our legislation contains an important principle of psychology: Men seldom draw the best from themselves unless pressed by circumstances and deadlines. This bill contains deadlines and it imposes rather tough standards on industry, municipalities, and all other sources of pollution.

> Only under such conditions are we likely to press the technological threshold of invention into new and imaginative developments that will allow us to meet the objectives stated in our bill.
>
> 2 Leg. Hist. 1278.

Thus, the FWPCA requires that all direct dischargers of pollutants must apply "the best practicable" technology to control pollution by 1977, 33 U.S.C. § 1311(b)(1)(A) (Supp. II, 1972), and must apply "the best available" technology by 1983, 33 U.S.C. § 1311(b)(2)(A) (Supp. II, 1972). In addition, the Act requires that all newly constructed direct sources of water pollution incorporate the "best available" control technology and that the EPA administrator specify in detail the precise limitations that each category must meet. 33 U.S.C. § 1316 (Supp. II, 1972).

The effectiveness of the FWPCA's plan to require the phasing in of increasingly effective pollution technology and thereby to restore the quality of the nation's waters obviously depends upon the breadth of the Act's coverage. To the extent polluting materials, or polluters, or waterways, or methods of release are not regulated by the FWPCA's provisions, the Act's purpose to reduce and eventually to eliminate water pollution will be frustrated.

Plainly, the purposes and policies behind the FWPCA call for the Act to be broadly construed. Moreover, Congress intended that the Act be construed to extend, not to restrict, its reach. In a discussion of the "significant provisions" of the Conference bill, Senator Muskie declared:

> Based on the history of consideration of this legislation, it is obvious that its provisions and the extent of application should be construed broadly.
>
> 1 Leg. Hist. 178.

This Court has continually reaffirmed that remedial legislation, such as the FWPCA, is to be liberally construed consistent with the statute's overriding purpose. *Stewart v. Kahn,* 78 U.S. (11 Wall.) 493, 504 (1870); *Logan v. Davis,* 233 U.S. 613, 628 (1914); *Peyton v. Rowe,* 391 U.S. 54, 65 (1968); *United States v. Bacto-Unidisk,* 394 U.S. 784, 798 (1969). In particular, legislation designed to abate water pollution should be liberally construed. *United States v. Standard Oil Co.,* 384 U.S. 224, 226 (1966) (Douglas, J.); *United States v. Republic Steel Corp.,* 362 U.S. 482, 491 (1960) (Douglas, J.). The reason such legislation receives a liberal construction was well put by Mr. Justice Holmes: "A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it." *New Jersey v. New York,* 283 U.S. 336, 342 (1931).

If any provisions of the FWPCA demand to receive this broad construction, it is the sections that define its terms—for these determine the Act's scope. Thus, the Act enforces EPA's effluent limitations by providing that the "discharge" of any "pollutant" from any "point source" into "navigable waters" is unlawful except in compliance with the specified statutory provisions. 33 U.S.C. § 1311(a) (Supp. II, 1972). The scope of the FWPCA's coverage is completely dependent on the definitions of these critical terms. Repre-

sentative Blatnik, a member of the House Public Works Committee and of the Conference Committee, made the point succinctly:

> The total utility of the bill is reflected in the definitions of the terms pollutant, pollution, point source, discharge, and toxic pollutant. To revise any of these definitions is to upset the common threat [sic] of the bill. If there is a part of this bill that can be labeled 'most important,' it is these definitions. To revise them in a way to limit their coverage is to severely detcact [sic] from the effectiveness of the bill.
>
> 1 Leg. Hist. 356.

In summary, respondents believe that the purposes of the FWPCA and the intent of Congress, as well as applicable canons of interpretation, require this Court to give as broad a construction to the term "pollutant" as the congressional language will reasonably sustain. Certainly this Court should be reluctant to interpret the term pollutant "in a way to limit [its] coverage" by exempting AEA-regulated radioactive materials from the FWPCA and thereby "severely detract from the effectiveness" of the Act.

B. Congress' Detailed Consideration Of The FWPCA Suggests That Primary Importance Should Attach To The Statute's Language.

It is, of course, a basic canon of statutory construction that the language that Congress writes into law, particularly in the absence of any ambiguity, should determine how a statute is intepreted.

> In matters of statutory construction the duty of this Court is to give effect to the intent of Congress, and in so doing . . . first reference is of course to the literal meaning of the words employed.
>
> *Flora v. United States,* 357 U.S. 63, 65 (1958).

Beyond this general rule, the history of the FWPCA itself should convince the Court in interpreting the Act to give primary weight to the language Congress chose to employ. The final bill which was enacted into law was the product of a three-month Conference between the Senate and the House. During the 39 meetings of the Conference Committee—"often starting early in the morning and running late into the evening"[10]—the bill received "microscopic scrutiny," which Senator Randolph declared he had "seldom seen a bill of any nature receive." 1 Leg. Hist. 185. Moreover, according to Senator Muskie, the Conference Committee

> tried in this legislation not to leave the final evaluation of the bill to legislative history, but instead to try to write into law as clearly as possible the intent of Congress.
>
> 1 Leg. Hist. 164.

In light of the unusually careful attention given the bill by Congress and the stated effort to write its intent into law, this Court should be slow to depart from the plain meaning of the statutory language. This caution applies particularly strongly in the case

[10] 1 Leg. Hist. 161. Senator Muskie went on to declare:
> I have been a Member of the Senate for 13 years, and I have never before participated in a conference which has consumed so many hours, been so arduous in its deliberations, or demanded so much attention to detail from the members. *Id.*

of provisions that the framers are known to have regarded as crucial, such as the definition of the key term pollutant involved in the instant case.

C. The Act Explicitly Defines Pollutant To Include All Radioactive Materials.

The FWPCA defines what materials are pollutants and what materials are not pollutants:

> *The term 'pollutant' means* dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, *radioactive materials,* heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, muncipal, and agricultural waste discharged into water. *This term does not mean* (A) 'sewage from vessels' within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.
>
> 33 U.S.C. § 1362(6) (Supp. II, 1972) (emphasis added).

Since only the discharge of a "pollutant" will trigger the Act's regulatory mechanism, the definition of pollutant is central to the FWPCA.

Not surprisingly, the definition is most noteworthy for its breadth. Indeed, the terms employed are so

broad and all-inclusive that most pollutants would seem likely to be covered by two or three of the itemized categories. Radioactive releases from nuclear power plants, for example, would arguably appear to qualify as both "industrial wastes" and "chemical wastes." But even more precisely, the definition explicitly names "radioactive materials" without exception or limitation as being subject to the FWPCA.

In analyzing the specific phrase "radioactive materials," there can be little doubt that its natural meaning includes all radioactive materials, including those regulated under the Atomic Energy Act. In both popular and technical usage, the phrase always refers generically to *all* such materials. Thus, radioactive is defined as "pertaining to, exhibiting, or caused by radioactivity." *Random House Dictionary of the English Language* 1185 (unabridged ed. 1967). Material is the "substance or substances of which a thing is made" or "any constituent element of a thing." *Id.*, at 884. *Accord, Webster's Third New International Dictionary* 1872, 1392 (unabridged ed. 1969).

In a technical sense, the Nuclear Regulatory Commission's "Standards for Protection Against Radiation," 10 C.F.R. Part 20 (1975), define "radioactive material" to mean "any such material *whether or not subject to licensing control by the Commission.*" 10 C.F.R. § 20.3(13) (1975) (emphasis added). EPA has defined the term in its proposed "Environmental Radiation Protection Standards for Nuclear Power Operations," as "any material which emits radiation." 40 Fed. Reg. 23419, 23423 (May 29, 1975). And in the

glossary of nuclear terms published by the Atomic Energy Commission, the term "radioactive materials" is used throughout as a broad, generic term.[11]

Moreover, it is important to note the broad scope of the exception that petitioners seek. Radioactive materials that are regulated under the Atomic Energy Act constitute all of the radioactive materials that are utilized by man in quantity.[12] By definition, they include all radioactive substances produced by man in nuclear reactors during the fission process, as well as uranium and thorium which are the naturally occurring fuel for the reactors.[13] Therefore, these AEA-regulated radioactive materials include all the radioactive materials utilized and produced in the generation of electricity, all such materials utilized and produced by the government in manufacturing atomic weapons, and the vast majority of these materials used in

[11]United States Atomic Energy Commission, *Nuclear Terms: A Glossary* (2d ed. n.d.). The *Glossary* uses the term "radioactive material" as part of numerous definitions of more specialized terms, but never defines the term itself, and defines the term "radioactive" extremely broadly as "exhibiting radioactivity or pertaining to radioactivity." *Id.*, at 47.

[12]Naturally-occurring radioactive materials and accelerator produced isotopes are all that is left to FWPCA regulation. 40 CFR § 125.1 (y) (1974). While radium is the only naturally occurring radioactive material that man uses in any amount, radium discharges are extremely small compared to those of AEA-regulated radioactive materials. Battelle Memorial Institute, Pacific Northwest Laboratories, *Program for Management of Hazardous Wastes* 153, Table 19 (1973) (prepared for the Environmental Protection Agency) [hereinafter cited as *EPA Hazardous Wastes Report*]. Accelerator produced isotopes are not even mentioned as a source of radioactive release to the environment in the Battelle-EPA survey. *Id.*

[13]*See* Brief for Petitioners, at 20 nn. 3-5.

industry, medicine, and university research.[14] The amount of other radioactive materials, which are not subject to the Atomic Energy Act and with which man is involved is, by comparison, minor.

Thus, the vast majority of radioactive materials discharged into water by point sources are the radioactive materials subject to the Atomic Energy Act.[15] If such materials are excepted, the exception has essentially devoured the rule and reduced the Act's reference to "radioactive materials" to virtually an empty gesture. This Court has emphasized that:

> It is our duty 'to give effect, if possible, to every clause and word of a statute' . . . rather than to emasculate an entire section, as the Government's interpretation requires.
>
> *United States v. Menasche,* 348 U.S. 528, 538-39 (1955).

[14]A study of hazardous wastes commissioned by the Environmental Protection Agency discussed the relative importance of different sources in generating radioactive wastes in general as follows:

> In summary, the primary source of radioactive wastes in the future will be a rapidly growing commercial power industry. The second major source will be the Federal government, specifically the Atomic Energy Commission (AEC), where large inventories of wastes have been generated from past weapons production and current production rates are still significant. In addition, a small amount of miscellaneous medical, research and development, and industrial applications.
>
> *EPA Hazardous Wastes Report, supra* note 12, at 168.

See also Table 19 which summarizes the projected sources of all radioactive wastes in 1980. *Id.*, at 153.

[15]The Court below made the point well:

> We are advised in the instant case that 'by-product material,' 'source material,' and 'special nuclear materials' constitute virtually all of the radioactive materials that are of significant concern to water quality, and if such materials are excepted from the [FWPCA] then the exception is devouring the general policy of the statute.
>
> 507 F.2d, at 749.

Congress itself has utilized the term "radioactive material" or its equivalent in other legislation. By consistent action, Congress has demonstrated that it will not create an exception of the scope sought here without providing for it in express statutory language. Where Congress has used the term without explicit limitation, the phrase has been intended to include all radioactive materials. When Congress has sought to exclude from a statute those radioactive materials subject to the Atomic Energy Act, it has done so in formal statutory language.

For example, in the Radiation Control for Health and Safety Act, 82 Stat. 1173, 42 U.S.C. § 263(b) *et seq.* (1970), which regulates electronic product radiation, Congress did exclude AEA-regulated materials from the Act, but it did so in the statute:

> (a) The Secretary [of Health, Education and Welfare] shall conduct the following studies . . .:
>
> (1) A study of present state and Federal control of health hazards from electronic product radiation and other types of ionizing radiation, which study shall include but not be limited to . . .
>
> (A) control of health hazards from *radioactive materials other than materials regulated under the Atomic Energy Act of 1954* . . . .
>
> 42 USC. § 263(e) (1970) (emphasis added).

Similarly, the House-passed version of the Water Quality Improvement Act of 1970, 84 Stat. 91 (in a provision that was omitted in the Conference bill) utilized explicit statutory language to exclude AEA-regulated radioactive materials:

> . . . matter means any substance of any description or origin, other than oil, dredged spoil, and human body wastes and the wastes from toilets and other receptacles intended to receive or retain human body wastes, which, when discharged into the navigable waters of the United States or the waters of the contiguous zone in substantial quantities, presents, in the judgment of the Secretary, an imminent and substantial hazard to public health or welfare, including fish, shellfish, and wildlife, and shorelines and beaches, *but such term does not include byproduct material, source material, and special nuclear material as defined in the Atomic Energy Act.* . . .
>
> H.R. 4148, 91st Cong., 1st Sess. § 17(a) (2) (1969) (emphasis added).

By contrast, the Safe Drinking Water Act (SDWA), 88 Stat. 1660, 42 U.S.C.A. § 300f (Supp. Feb., 1975), enacted on December 6, 1974, employs no exception or limitation in defining "contaminant" to include *"radiological substance or matter."* 42 U.S.C.A. § 300(f)(6) (Supp. Feb., 1975) (emphasis added). The phrase—used without qualification—encompasses AEA-regulated materials.[16]

In short, the term "radioactive materials" as used in both its popular and technical senses and as it

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[16]This is confirmed by the House Report, which states:

> [42 U.S.C.A. § 300f(6) (Supp. Feb. 1975)] defines 'contaminant' to mean 'any physical, chemical, biological, or radiological substance or matter in water.' *This, of course, would include any radioactive materials whether or not they originated from any source under the jurisdiction of the Atomic Energy Commission.*
>
> H. Rep. No. 93-1185, 93d Cong., 2d Sess. 16 (1974) (emphasis added).

has been used by Congress in other legislation means *all* radioactive materials.[17] The meaning which petitioners would ascribe to the term by excluding AEA-regulated radioactive material is strained and unnatural. This Court will not accept such a construction of a statutory phrase. *Woolford Realty Co. v. Rose,* 286 U.S. 319, 327 (1932).

D. Since Congress Wrote Exceptions Into The Statute, Further Exceptions Cannot Properly Be Implied.

A decision to exclude AEA-regulated materials from the phrase "radioactive materials" would, therefore, give the statutory language an unnatural meaning, as well as a narrow reading in a context that demands a broad one. In addition, such an interpretation would create by implication a major exception despite the fact that Congress wrote other specific exclusions into the definition of pollutant, and chose not to include the exclusion which petitioners seek. 33 U.S.C. § 1362(6) (A) and (B) (Supp. II, 1972). This Court has held on numerous occasions that when a statute contains specific exceptions, no other ex-

[17]Even in the debate on the FWPCA, it is clear that congressmen understood that the unqualified phrase had this broad meaning. When Congressman Wolff offered an amendment to the House version of the FWPCA which was directed at insuring that the states could regulate all radioactive materials which were discharged into water, 1 Leg. Hist. 542, the entire debate on the amendment proceeded on the assumption that the term "radioactive materials" referred to all such materials whether or not subject to AEA regulation. For example, Congressman Price stated as to "radioactive materials the target of the Amendment is the Atomic Energy Act." 1 Leg. Hist. 542-43. Congressman McCormack, after stating that he had been a "nuclear research scientist at the Hanford atomic energy plant" for 20 years, proceeded with his presentation on the assumption that the unqualified use of the term "radioactive materials" meant *all* such materials. 1 Leg. Hist. 549-50.

ceptions are to be read into the statute. As Mr. Justice Story stated, "[it is a] well-known maxim that an exception in a statute amounts to an affirmation of the application of its provisions to all other cases not excepted." *Bend v. Hoyt,* 38 U.S. (13 Pet.) 263, 271-72 (1839). *Cf. Dameron v. Brodhead,* 345 U.S. 322, 326 (1953); *Pampanga Sugar Mills v. Trinidad,* 279 U.S. 211, 215 (1929); *Kendall v. United States,* 107 U.S. (17 Otto) 123, 125 (1882).

In a case analogous to the case at bar, involving a claim of exemption from the Fair Labor Standards Act, Mr. Justice Frankfurter, on behalf of the Court, stated:

> A new national policy was here formulated with exceptions, catalogued with particularity and not left within the broad dispersing power of the Administrator. Exemptions made in such detail preclude their enlargement by implication.
>
> *Addison v. Holly Hill Fruit Products,* 322 U.S. 607, 617 (1944).

This statement is the generally accepted rule. A noted commentator on statutory construction has written:

> It has been held that exceptions are not to be implied. Especially where there is an express exception, it comprises the only limitation on the operation of the statute and no other exceptions will be implied. *An enumeration of exceptions from the operation of a statute indicates that it should apply to all cases not specifically enumerated.*
>
> 2A J. Sutherland, *Statutes and Statutory Interpretation* § 47.11 (4th ed. 1973) (emphasis added).

The Court below followed this rule of construction in unanimously holding that all radioactive water pollutants were subject to FWPCA regulation: "[W]here a statute contains express exceptions, the courts should be exceedingly slow in implying unexpressed exceptions, lest the courts thereby thwart the legislative intent." 507 F.2d, at 748.

If Congress as a whole had intended to exclude AEA-regulated radioactive materials from the FWPCA, such a major exception would have been included in the list of statutorily authorized exceptions. Significantly, the exemptions that Congress did grant are exceedingly narrow. It is ironic that the government now seeks to create by implication an exception far broader and more significant than the only two Congress would permit.

E. Petitioners' Interpretation Is Inconsistent With Other Express Provisions Of The FWPCA.

To create the exclusion for AEA-regulated radioactive material that petitioners seek would conflict with several other provisions of the FWPCA and make the Act internally inconsistent. First, the FWPCA defines "pollution" as the "*man-made or man-induced alteration* of the chemical, physical, biological and *radiological* integrity of water." 33 U.S.C. § 1362(19) (Supp. II, 1972) (emphasis added). The overriding purpose of the FWPCA is to abate water pollution. Congress formally declared its understanding that such pollution included "man-made" or "man-induced" alteration of the "radiological integrity of water."

Yet if petitioners' position is adopted, the vast majority of "man-made" or "man-induced" radioactivity would not be covered by the FWPCA. *See* discussion *supra,* at pp. 22-23. Such an exclusion would render virtually meaningless Congress' declaration that one of the FWPCA's express goals was to restore and maintain the radiological integrity of water. This Court "cannot interpret federal statutes to negate their own stated purposes." *New York State Department of Social Services v. Dublino,* 413 U.S. 405, 419-20 (1973) (Powell, J.).

A second provision of the FWPCA specifically prohibits the discharge of certain materials into water and indicates that Congress fully intended the FWPCA to apply AEA-regulated radioactive materials. Among the materials the FWPCA makes it "unlawful to discharge" are "any radiological . . . warfare agent" and "high-level radioactive waste." 33 U.S.C. § 1311(f) (Supp. II, 1972). Both of these terms refer *only* to AEA-regulated materials.[18] If the FWPCA completely exempted such materials from its regulatory scheme, section 1311(f)'s direct regulation of AEA-regulated radioactive materials would

[18] "High-level radioactive wastes" are defined by NRC Regulations as "those aqueous wastes resulting from the operation of the first cycle solvent extraction system, or equivalent, and the concentrated wastes from subsequent extraction cycles, or equivalent, in a facility for reprocessing irradiated reactor fuels." 10 C.F.R. Part 50, Appendix F, § 2 (1975). The only sources for the production of "radiological warfare agents" are ERDA's production facilities. Again by definition, such facilities and such materials come within the definitions of source material, by-product material, and special nuclear material regulated by the Atomic Energy Act. See note 13, *supra.*

be inconsistent with the scope of the rest of the FWPCA.[19]

Moreover, the precise wording of section 1311(f) emphasizes that Congress recognized that the FWPCA applies to AEA-regulated materials. Specifically, the section provides:

> *Notwithstanding any other provision of this chapter,* it shall be unlawful to discharge any radiological, chemical, or biological warfare agent or *high-level radioactive waste* into the navigable waters.
>
> 33 U.S.C. § 1311(f) (Supp. II, 1972) (emphasis added).

For Congress to prohibit the discharge of "high level radioactive waste" "notwithstanding any other provision of *this chapter*" recognizes that "this chapter" —the FWPCA—creates a permit system that applies to such radioactive waste and that might permit its discharge. On the other hand, if such materials were excluded from the FWPCA, as petitioners contend, the phrase "[n]otwithstanding any other provision of this chapter" would be meaningless since "this chapter," the FWPCA, could have no possible application to AEA-regulated radioactive materials such as "high-level radioactive waste."

Finally, the provision governing new sources suggests that the FWPCA applies to nuclear facilities licensed under the Atomic Energy Act. The FWPCA

[19]Indeed, under petitioners' theory of the case, section 1311(f) is surplusage since petitioners contend the Atomic Energy Act and its regulations already prohibit the discharge of high-level radioactive waste. Brief for Petitioners, at 36 n. 25.

requires the EPA Administrator to establish "national standards of performance" for newly constructed point sources of pollution. 33 U.S.C. § 1316 (Supp. II, 1972). This provision enumerates a minimum list of industrial categories for which EPA must set standards, including, *inter alia,* "steam electric power plants." 33 U.S.C. § 1316(b) (1) (A) (Supp. II, 1972). Some electric power plants manufacture the steam needed to generate electric power by burning fossil fuels; others manufacture the steam by using the heat generated by nuclear fission in a reactor.[20] The Federal Power Commission in the *1970 National Power Survey* (promulgated in December 1971 and available at the time Congress was debating the FWPCA), estimated that almost one-half of all steam electric power plants in service in

[20]EPA describes the process by which nuclear plants generate electricity as follows:

> *A light-water-cooled nuclear power station operates on the same principle as a conventional fossil-fueled (oil or coal) power station except that the heat generation is by nuclear fission rather than combustion. The heat liberated in either process is used to convert water into steam.* The steam enters a three-stage turbine consisting of one high-pressure stage and two low-pressure stages. The turbine consists of a common central shaft attached to a circular array of curved blades. The steam impacts on these blades turning the rotor at high speeds. The turbine shaft is connected to a wire wound armature in the generator. This armature rotates in an applied magnetic field producing alternating electric current.
>
> After passing through the turbine the low pressure steam passes through a condenser where the steam transfers its remaining heat to the condenser cooling water and is condensed back into water and is recycled into the boiler. The heated condenser cooling water may be released directly to the environment in a single-pass open-cycle cooling system.
>
> United States Environmental Protection Agency, *Environmental Analysis of the Uranium Fuel Cycle—Part II Nuclear Power Reactors* 3 (November, 1973) (emphasis added).

1990 would be nuclear powered. *Id.*, at 1-1-18, Table 1.3. The exclusion of AEA-regulated radioactive materials from the FWPCA's definition of pollutant would exempt one of the two major types of pollution that will be produced by nuclear "steam electric power plants."[21] Yet Congress specifically indicated that such plants should be regulated under the FWPCA.

In summary, to create the exclusion petitioners seek would be inconsistent with the Act's definition of pollution and with its regulation of high-level radioactive wastes, radiological warfare agents, and steam electric power plants.[22]

[21]The main water pollutants from nuclear steam generating stations are waste heat and AEA-regulated nuclear materials. *See, e.g.*, University of Oklahoma—Science and Public Policy Program, *Energy Alternatives: A Comparative Analysis* 6-32 (May, 1975) (prepared for the Council on Environmental Quality, ERDA, NRC, EPA, Federal Power Commission, National Science Foundation and Department of the Interior) [hereinafter cited as *Energy Alternatives*].

[22]To exclude AEA-regulated materials would also frustrate the Congressional desire to provide careful regulation for hazardous and toxic materials, under the FWPCA.

The FWPCA also provides for the regulation and imposition of penalties for the discharge of "hazardous substances" in harmful amounts, 33 U.S.C. § 1321 (Supp. II, 1972), and establishes as a national policy a prohibition on the discharge of toxic pollutants in toxic amounts. 33 U.S.C. §§ 1251(a)(3), 1317 (Supp. II, 1972). The specific and elaborate regulatory provisions governing these types of pollutants—as well as the FWPCA's legislative history—demonstrate that control of these types of materials was a primary concern of the Act.

Radioactive materials are indisputably toxic and hazardous in the sense in which the terms are used in the FWPCA. *See* 33 U.S.C. §§ 1321(b)(2)(A), 1362(13) (Supp. II, 1972). Indeed, William Ruckelshaus, then Administrator of the EPA, in testimony on the original administration version of the FWPCA, stated that the hazardous substances to be regulated under the FWPCA would include AEA-regulated radioactive materials such as "uranium-233 and iodine-129 and other radioactive materials and mixtures with equally dangerous properties and effects." *Hearings on Water Pollution Control Legislation before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works*, 92d Cong., 1st Sess., pt. 1, at 81 (1971). *See also EPA Hazardous Wastes Report, supra* note 12; Resource Recovery Act, 84 Stat. 1227, 42 U.S.C. § 3254f (1970).

Respondents respectfully submit that for the Court to create the exception for which petitioners contend would do extreme violence to the text of the Act and would fail to honor both the congressional directives and the decisions of this Court that require that the FWPCA be given a liberal interpretation.[23]

II. THOUGH UNNECESSARY AND INAPPROPRIATE IN LIGHT OF THE ACT'S CLEAR LANGUAGE, AN ANALYSIS OF THE LEGISLATIVE HISTORY CONFIRMS THAT CONGRESS SPECIFICALLY DECIDED NOT TO EXEMPT AEA-REGULATED RADIOACTIVE MATERIAL FROM REGULATION UNDER THE FWPCA.

The language of the FWPCA plainly and unambiguously defines "pollutant" to include all radioactive materials including those regulated under the Atomic Energy Act. As we have demonstrated, this straightforward and unavoidable interpretation of the

[23]The petitioners have appropriately not argued that this Court should defer to the administrative interpretation that has been placed on the definition of the term "radioactive materials". This case presents a purely legal issue involving a question of congressional intent and no claim of agency expertise. Moreover, the record in the present case reveals considerable uncertainty over EPA's position on the issue. *See* pp. 5-7, *supra*. "The Courts are the final authorities on issues of statutory construction [citation omitted], and 'are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the Congressional policy underlying a statute'." *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 727, 745-46 (1973) (Marshall, J.).

FWPCA's language is both reinforced by and consistent with (1) the natural meaning of the term "radioactive material," (2) numerous other provisions of the FWPCA, (3) the purposes and policy of the FWPCA, and (4) a liberal construction of the statute's terms, as Congress intended and as decisions of this Court require.

Nonetheless, based on carefully selected portions of the FWPCA's legislative history which are generally presented out of context, petitioners urge this Court essentially to read the term "radioactive materials" out of the FWPCA's definition of pollutant. Most improperly, petitioners attempt to use legislative history to create ambiguity, not to solve it, since the FWPCA is both clear and consistent on its face. This Court has held that it will not use legislative history for such a purpose. *See United States v. Shreveport Grain and Elevator Co.,* 287 U.S. 77, 83 (1932).

Furthermore, this Court has emphasized there is no need to resort to legislative history under circumstances similar to this case: "Having concluded that the provisions of [the statute] are clear and unequivocal on their face, we find no need to resort to the legislative history of the Act." *United States v. Oregon,* 366 U.S. 643, 648 (1961). *See Ex parte Collett,* 337 U.S. 55, 61 (1949); *Gemsco, Inc. v. Walling,* 324 U.S. 244, 260 (1945); *United States v. Missouri Pac. R. Co.,* 278 U.S. 269, 278 (1929).

Respondents therefore conclude, based on earlier decisions of this Court, that resort to legislative history in the present case is inappropriate and unwarranted. However, in view of the heavy reliance petitioners place on isolated portions of the legislative history, respondents will simply seek to place the full legislative record before the Court. Before approving the creation of a substantial exemption from the FWPCA, the Court must carefully consider whether Congress can in any sense be said to have intended such a result.

When the Tenth Circuit examined the congressional materials on which the government relies, the three-judge panel unanimously concluded they were "conflicting and inconclusive," 507 F.2d, at 748, and provided no basis for overriding unambiguous statutory language. Respondents believe that the legislative history, when considered fully and in context, simply reinforces the conclusion that Congress intended the term "radioactive materials" to have its natural meaning and intended that AEA-regulated radioactive effluents be required to meet the same pollution reduction standards as any other industrial releases.

Specifically, an objective reading of the record establishes that the Senate consistently rejected efforts to limit the scope of the FWPCA, as did the Conference Committee. The only solace available to petitioners derives from a concerted and orchestrated effort by a number of Representatives in the House to obtain approval for exempting AEA-regulated materials from the regulatory scheme of the FWPCA. Undeniably, some members of the House of Representatives favored the exemption for which the gov-

ernment is now contending. Respondents respectfully submit, however, that this Court should not grant here a political victory to a political minority that could attain its objectives neither in the House Public Works Committee, nor on the floor of the House, nor in the Conference Committee.

A. The Senate Bill Fully Intended To Cover All Radioactive Materials Discharged Into Water.

The FWPCA originated in the Senate. Following two years of extensive hearings on water pollution legislation, the Subcommittee on Air and Water Pollution and the full Senate Committee on Public Works conducted 45 executive sessions in 1971 marking up a bill. The bill was reported out of Committee on October 28, 1971. As reported, S.2770 defined "pollutant" as follows:

> (f) The term 'pollutant' means, ***but is not limited to,*** dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, ***radioactive materials,*** heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, agricultural, ***and other waste*** introduced into water: Provided, ***it does not mean*** (1) 'sewage from vessels within the meaning of section 312 of this Act; or (2) water, gas or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located.
>
> 2 Leg. Hist. 1697-98 (emphasis added).

In explaining this definition, the Senate Committee's Report emphasized the importance of defining "pollutant:"

> For the first time the Committee would add to the law a definition of the term pollutant. In order to trigger the control requirements over addition of materials to the navigable water, waters of the contiguous zone and the ocean, it is necessary to define such materials so that litigable issues are avoided over the question of whether the addition of a particular material is subject to control requirements.
>
> 2 Leg. Hist. 1494.

The Committee went on to point out that the definition was drawn "so that before *any* material can be added to the navigable waters authorization must first be granted" by EPA. *Id.* (emphasis added).

The purpose of the Committee to bring *every* conceivable material within the FWPCA's ambit is plain: The Committee's definition explicitly states that the definition of "pollutant" is *"not limited to"* the virtual laundry list of materials set out. Indeed, seeking to gain the widest possible scope, the definition even includes a residual category of "other wastes." In addition, the Senate Report emphasizes that the definition contains two "specific" exceptions, strongly implying that no further exceptions were contemplated. *Id.* Interpreted in light of the stated intent of the Committee to cover "any" material, and the indisputably broad language of the section in which it appears, the phrase "radioactive materials" can only be taken to have its normal meaning and

refer to all such materials, which would of course include AEA-regulated radioactive materials.[24]

In fact, the Senate Committee's Report provides an even more explicit indication of the Committee's intent. Section 306 of the Senate bill (corresponding to 33 U.S.C. § 1316 (Supp. II, 1972) in the FWPCA as enacted) required the EPA Administrator to set "standards of performance" for specified industrial categories. (These standards require newly constructed sources to apply the best available technology to reduce pollution.) The section's provisions listed 28 industrial categories for which such standards were to be set and directed that the EPA Administrator add additional categories as appropriate. In discussing this section, the Senate Report notes that the Committee "agreed not to include in its list of new sources nuclear fuels processing plants," 2 Leg. Hist. 1477, since EPA did not have the technical capability to establish effluent controls for reprocessing plants "at this time." However, the Committee's report went on to state unequivocally that "the Committee expects that EPA will develop the capability," and continued:

> The Bureau of Radiological Health, which was transferred to the Environmental Protection Agency should have the capacity to determine those levels of control which can be achieved for nuclear fuels processing plants. If they do not, such a capability should be developed and this particular source should be added to the list of new sources as soon as possible.
>
> *Id.*

[24]See pp. 21-22, *supra*.

It would be difficult to imagine a clearer indication that the Committee intended that EPA's Bureau of Radiological Health regulate the radioactive releases from nuclear fuels processing plants. Since the radioactive materials released by these plants are exclusively[25] source, by-product and special nuclear materials, the conclusion is unavoidable that the Senate Committee intended that AEA-regulated effluents be subject to the FWPCA.[26] The fact that there was no discussion of any jurisdictional problem simply underscores the extent to which the Committee was committed to comprehensive regulation.

Thus, even without resort to the general statements indicating the Committee's intent to draft an all-inclusive pollution control statute,[27] the Senate Report demonstrates a clear intent to include within the coverage of the FWPCA the release of all radioactive materials to navigable waters.

[25]*Energy Alternatives, supra* note 17, at 6-35, Table 6-14; M. Eisenbud, *Environmental Radioactivity* 296, Table 11-2 (2d ed. 1973).

[26]Petitioners' lame explanation, Brief for Petitioners, at 39 n. 29, that the Senate Committee intended EPA to have authority over only the non-radiological releases from such plants is ludicrous. In 1970, the Bureau of Radiological Health to which the Senate Committee specifically refers, made a study of the liquid effluents of nuclear fuels reprocessing plants. The study involved *only* AEA-regulated radioactive materials discharged by these plants. Bureau of Radiological Health, *Liquid Waste Effluents from a Nuclear Fuel Reprocessing Plant* (November, 1970). *See also* Bureau of Radiological Health, *An Investigation of Airborne Radioactive Effluent from an Operating Nuclear Fuel Reprocessing Plant* (July 1970), Bureau of Radiological Health, *An Estimate of Radiation Doses Received by Individuals Living in the Vicinity of a Nuclear Fuel Reprocessing Plant* (1970).

[27]*See, e.g.*, 2 Leg. Hist 1269-70 (Statement of Senator Randolph).

No amendments were offered to the definition of pollutant on the Senate floor. Petitioners, however, emphasize a colloquy between Senator Muskie and Senator Pastore that occurred early in the floor debate on S.2770. Against the background of the statute's unqualified language and the statements in the Senate Report, it would be difficult to rest a finding of congressional intent on the isolated remarks of two Senators. *United States v. O'Brien,* 391 U.S. 367, 384 (1968); *United States v. Oregon,* 366 U.S. 643, 648 (1961); *Duplex Co. v. Deering,* 254 U.S. 443, 474-75 (1921).

In any event, petitioners have placed a gloss on the discussion that cannot withstand analysis. Senator Pastore asked Senator Muskie, "Does this measure that has been reported by the Committee in any way affect the existing law, that is the existing Atomic Energy Act of 1954, insofar as the regulatory powers of the AEC are concerned with reference to radioactive material?" 2 Leg. Hist. 1265-66. Senator Muskie replied that it did not. *Id.* At the outset it should be noted that Senator Pastore's terminology obviously assumes that the phrase "radioactive material" applies to the type of materials regulated by the AEC., since he uses that phrase to describe the materials subject to AEC regulation. As Vice-Chairman of the Joint Committee on Atomic Energy, Senator Pastore's understanding of the connotation of the phrase is certainly entitled to some weight.

In general, this floor debate merely reiterates that the FWPCA does not alter the regulatory authority

of the AEC with respect to its statutory responsibilties under the 1954 Atomic Energy Act. There was no discussion of any exclusions from the meaning of the term "radioactive materials" in the FWPCA. Indeed, the tone of Senator Pastore's question seems to assume that the FWPCA regulates the discharge of AEA-regulated radioactive materials and that he is merely seeking to clarify the extent of the impact on the AEA. If he thought there were a question about whether the FWPCA applied to such materials, he would surely have asked about the scope of the FWPCA, rather than about its impact on the AEA.[28]

But whatever Senator Pastore meant to ask, and whatever Senator Muskie intended by his response, the colloquy did not end with that single exchange. And the remainder of the Pastore-Muskie discussion establishes that Senator Muskie believed—and the Senate Committee believed—that the FWPCA's coverage included radioactive materials regulated by the Atomic Energy Act.

Senator Muskie continued that *"in addition"* he wanted to discuss litigation (*Northern States Power Co. v. Minnesota,* 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.,* 405 U.S. 1035 (1972) dealing with the more precise question of "the setting of effluent limitations as they involve nuclear power plants." He

[28]In fact, Senator Pastore's question is quite ambiguous in another respect, since it does not refer to the AEC's regulatory authority over "utilization and production facilities" under which the AEC regulates the effluent from nuclear power plants and other licensed facilities. *Compare* 10 C.F.R. Parts 30, 31, 36, 40, 70 (1975) *with* 10 C.F.R. Part 50, esp. §§ 50.34a and 50.36a (1975).

told Senator Pastore that "the committee considered speaking specifically to that decision [*Northern States Power*], but chose to remain silent so as not to prejudice the decision or any appeal from it." 2 Leg. Hist. 1266. The most salient feature of this response is the simple fact that the Committee would have had no occasion to speak to the *Northern States Power* case unless the FWPCA applied to radioactive materials subject to the AEC's jurisdiction. If the Act had the narrow scope claimed by petitioners, *the Northern States Power issue could never have arisen.* Thus Senator Muskie's act of raising the issue of *Northern States Power* and indicating that the Committee *chose* not to speak to the case, *not* because the FWPCA did not extend to the type of materials involved in *Northern States Power,* but because the Committee did not want to take a position on preemption, establishes beyond a doubt that Senator Muskie and the Committee assumed and intended that the FWPCA applied to radioactive materials regulated by the AEC.

In short, the language of the Senate bill, the contents of the Senate Report, and the brief exchange between Senators Muskie and Pastore establish that the definition of "pollutant" included in the Senate-passed bill encompassed all radioactive materials, including those regulated by the AEC.

B. House Supporters Of An Exception For AEA-Regulated Materials Failed To Win Its Inclusion In Their Bill, Had Uncertain Support On The Floor, And Recognized Their View Conflicted With That Of The Senate.

Following Senate passage of S.2770, the House Committee on Public Works, which had been considering a separate set of water pollution bills, took up consideration of the Senate bill. On March 11, 1972, the House Committee reported a bill, largely based on the Senate bill, though with amendments. The definition of pollutant in the House bill was identical to the Senate language *except that it added two further exceptions to the definition* (certain thermal discharges and organic fish wastes). 1 Leg. Hist. 1068.[29]

Once again, "radioactive materials" were included without limitation in the definition. But, as petitioners have noted, the House Report states that the radioactive materials referred to "are those not encompassed in the definition of source, by-product, or special nu-

[29]The full text of the House definition reads as follows:

(6) The term 'pollutant' means, but is not limited to, dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, *radioactive materials,* heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, agricultural, and other waste discharged into water. This *term does not mean* (A) 'sewage from vessels' within the meaning of section 312 of this Act; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines the injection or disposal of such water, gas, or other material will not result in the degredation of ground or surface water resources; or (C) thermal discharges in accordance with regulations issued pursuant to section 316 of this Act; or (D) organic fish wastes.

1 Leg. Hist. 1068 (emphasis added).

clear materials as defined by the Atomic Energy Act of 1954, as amended, and regulated pursuant to that Act." 1 Leg. Hist. 818.

Significantly, however, although the House Committee added two other explicit exceptions to the House bill's definition of pollutant, the discussion of AEC-regulated radioactive materials only reached the status of language in the House Report. Moreover, the language in the House Report—which stated that the radioactive materials referred to in the definition were those not regulated by the AEC—actually went only half way, because the House bill's definition of pollutant explicitly stated it was "not limited to" the materials listed. To establish an exception it was necessary not merely to omit a particular material from the listed materials, but also to write an affirmative exception. And the House Committee evidenced its understanding of this requirement by writing into the statute's definition of pollutant two specific exceptions not found in the Senate bill, 2 Leg. Hist. 1697-98. Since the discussion in the House Report makes clear that the case for the exception was made forcefully in Committee, the fact that the AEC's supporters could not win its inclusion in the bill itself suggests that the provision simply lacked the necessary support.

In any event, courts have recognized that committee reports offer limited evidence of congressional intent:

> . . . [W]e feel that the statement above mentioned in the House Report is not the criterion by which the courts must be guided in the future. The House Report, in this regard, was not agreed to in the Senate Report, nor was any mention made of it in the Conference Report. The report of a committee of the House 'does not go very far to show the intention of both houses of Congress.'
>
> *Davidson v. Gardner,* 370 F.2d 803, 828 (6th Cir. 1966).

See In Re Evans, 452 F.2d 1239, 1245 (D.C. Cir. 1971), *cert. denied,* 408 U.S. 930 (1972) ("While reports are unquestionably entitled to weight in determining the purpose of any statute, they are neither enacted by Congress nor signed by the President, and thus they do not have the force of legislation."); *United States v. Rohm and Haas Co.,* 500 F.2d 167, 173 (5th Cir. 1974), *cert. denied,* 420 U.S. 962 (1975).

The debate on the floor of the House evidences primarily a confusion over the scope of the bill's coverage. Most of the debate occurred on an amendment, offered by Congressman Wolff, that addressed one issue: the extent to which states would be permitted to regulate radioactive materials discharged into the environment. The amendment had nothing to do with the definition of "radioactive materials."[30] There are

[30]The Wolf amendment reads as follows:

> (b) Nothing shall preclude or deny the right of any State or political subivision [sic] thereof or interstate agency, with respect to radioactive materials and thermal discharges, to adopt or enforce any standard or limitation respecting the release of radioactive materials and thermal discharges into water, or any requirement respecting control or abatement of pollution from such radioactive materials and thermal discharges; except that if an effluent limitation or other limitation, effluent standard, prohibition, pretreatment standard, standard of performance, or regulation relating to radioactive materials or thermal discharges is in effect under this Act, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation or other limitation, effluent standard, prohibition, pretreatment standard,

three important aspects to the debate on the Wolff amendment. First, the text of the amendment related to the right of the states to regulate "radioactive materials." In the extended debate over that amendment, not one speaker had any doubt that the phrase "radioactive materials" in the Wolff amendment referred to radioactive materials regulated by the AEC. If that phrase had the narrow meaning ascribed to it in the House Report, the Wolff amendment would have been meaningless, only giving the states the right to regulate non-AEA regulated materials, a right which the states already possessed. Thus, the debate over the amendment suggests that House members understood the phrase "radioactive materials" to include those regulated by the AEA.

Second, at the outset of the debate on the Wolff amendment, the Chair of the House, in ruling on a point or order, determined that the FWPCA applied to AEA-regulated radioactive materials. Opponents of the Wolff amendment raised essentially the claim which the petitioners make in this Court. Specifically, Congressman Price sought to convince the Chair that the FWPCA did not apply to AEA-regulated materials. Since the Wolff amendment clearly applied to such materials, Congressman Price argued it was not germane to the FWPCA. The Chair rejected Price's position, indicating his understanding that the FWPCA applied to AEA-regulated radioactive ma-

standard of performance, or regulation relating to such radioactive materials or thermal discharges which is less stringent than the effluent limitation or other limitation, effluent standard, prohibition, pretreatment standard, standard of performance, or regulation under this Act.

1 Leg. Hist. 542.

terials. 1 Leg. Hist. 544. The significance of this ruling was recognized later in the debate by Congressman Hosmer, who noted that this parliamentary ruling "was decided upon a definition of the words 'radioactive material'." 1 Leg. Hist. 588.

Third, even beyond the Chair's ruling on the point of order there was considerable divergence of views concerning the extent of the House bill's coverage. Thus, in speaking on the Wolff amendment, Congressman Frenzel itemized the numerous mentions in the bill of radioactive materials and summarized his views this way:

> Mr. Chairman, the entire bill is shot full of references to thermal discharges and radioactive wastes. Clearly it was the intent of the committee and the bill's authors to provide for control of these types of pollution.
>
> 1 Leg. Hist. 543.

In addition, Congressman Wolff himself expressed the view that effluent limitations regarding the discharge of radioactive pollutants would be set under the FWPCA and that his amendment would merely assure that states would be permitted to go beyond those standards. 1 Leg. Hist. 544. Finally, Congressman McClory saw the Wolff-Frenzel amendment as simply making "eminently clear that we are controlling nuclear and thermal pollution in this bill." 1 Leg. Hist. 555.

The next day, Congressman Frenzel rose on the floor of the House to repeat the views that he had first expressed during the debate on the Wolff amendment:

In the definition section 502, radioactive waste is defined as a pollutant. Reference to radioactive wastes are made elsewhere throughout the bill. My statement on page H2622 of yesterday's Record details other references in the bill [1 Leg. Hist. 543]. . . .

No matter what kinds of discussions may take place on the floor of this House, it seems to me quite obvious in the legislation itself that it was a clear intent to include all kinds of pollution except the four specified exemptions in section 502 (6) A, B, C, D. No matter what some of our Members would like to be the intent of the bill, the bill is quite clear in this respect and needs no amplification. As long as the bill has stipulated what is to be exempted and what is to be controlled, nothing that is said on the floor of the House can change the language of this bill.

1 Leg. Hist. 746.

Thus, while there was sentiment on the part of some Representatives that AEA-regulated materials should not be regulated under the FWPCA, this sentiment never obtained the status of legislative language, was certainly not expressly shared by a majority of the members of the House of Representatives, and in the end only produced considerable confusion in the course of the House debates.

With the record in this state, the House passed the FWPCA and sent it to the Conference Committee. Moreover, it should be emphasized that House supporters of the exemption recognized that their last chance to secure an exemption was in the Conference

Committee. This in itself strongly suggests that the supporters of the exemption in the House recognized that at least the Senate version was clearly contrary to their views. Thus, Congressman Holifield stated his concern quite forcefully to one of the House managers: "I assume it is the intent of the gentleman, if he is one of the managers of the bill in Conference, to *try* to sustain . . . [the exemption] to the best of his ability." 1 Leg. Hist. 588 (emphasis added). Certainly, if Congressman Holifield thought that the Senate would agree to exempt AEA-regulated materials from the FWPCA, there would have been little point in calling on a House manager to "try to sustain" such an interpretation "to the best of his ability."[31]

C. The Conference Committee Revised The Definition Of Pollutant And Rejected Any Limitation.

The Conference Committee, in the words of Senator Muskie:

> held 39 meetings . . ., often starting early in the morning and running late into the evening.
>
> I have been a Member of the Senate for 13 years, and I have never before participated in a conference which has consumed so many hours, been so arduous in its deliberations, or demanded so much attention to detail from the members. . . .
>
> I would like to call attention to the fact that we have tried in this legislation not to leave the final evaluation of the bill to legislative history, but

[31]Congressman Holifield's statement also strongly suggests that he recognized that the normal meaning of the phrase "radioactive materials" included AEA-regulated radioactive materials and that a special effort was required to establish that such materials did not come within the FWPCA.

instead to write into the law as clearly as possible the intent of Congress.

1 Leg. Hist. 161-64.

The intensity of effort devoted to the Conference coupled with Senator Muskie's declaration that the Conference attempted to write the law as clearly as possible simply underscores the importance of carefully analyzing the action of the Conference Committee.[32]

There is little doubt that the Committee focused its attention on the definition of pollutant. The Conference accepted the definition of neither the House nor the Senate, but rather substituted a revised definition. 1 Leg. Hist. 326-27. (Petitioners' statement to the contrary, Brief for Petitioners, at 46, flatly misstates the Conference Report.[33]) The new Conference definition involved three significant changes. First, the Conference eliminated the provision in both the Senate and House definition providing that the term pollutant was "not limited to" materials specified in the definition. The revised Conference definition provided that the items listed establish the full meaning of the term.

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[32]See p. 19, *supra*.

[33]The Conference Committee Report stated its revision to the definitions section of the bill (section 502) as follows:

> Section 502 of the conference substitute is the same as the comparable provision of the Senate bill and the House amendment *with the following exceptions*:
>
> (1) *The definition of the term 'pollutant' contained in paragraph (6) has been amended to read as follows:*
>
> 1 Leg. Hist. 143 (emphasis added).

The Report then set out the full definition as revised by the Conference.

Second, the Conference dropped the reference to "other" wastes. Third, the Conference definition dropped the two specific exceptions that the House had added.

All three revisions suggest careful attention to the precise scope that the definition of "pollutant" would have. Moreover, the Committee's decision to drop the two exceptions that the House had written into its bill provides specific evidence that the Conference Committee carefully considered the scope of the definition.

In this context, the failure of the Conference to mention any exemption for AEA-regulated radioactive materials either in statutory language or in the Conference Report can only represent a conscious decision. The term radioactive materials was to have its full, natural meaning, and the standards of the FWPCA were to apply to the discharge of AEA-regulated materials.

Respondents believe there is no other serious interpretation that can be placed upon the action by the Conference Committee. If any doubt could be left, it is finally resolved by the startlingly different treatment accorded the Conference Report in the House and the Senate. In the House, Congressman Anderson of the Joint Committee on Atomic Energy sought to obtain once again from legislative history, what the exemption's supporters had been unable to accomplish in the Conference. 1 Leg. Hist. 226-27.

By contrast in the Senate, the exemption's supporters—if there were any—were noticeably quiet. Indeed, the only relevant exchange occurred between Senator

Buckley and Senator Muskie. Senator Buckley declared himself

> deeply concerned about clause 511(c)(2)(B) [33 U.S.C. § 1371(c)(2)(B) (Supp. II, 1972)]. This clause may, I understand, bar any Federal permitting or licensing agency, such as AEC, from imposing, as a condition precedent to the issuance of any license or permit, *any* effluent limitation other than limitations established pursuant to [the FWPCA].
>
> 1 Leg. Hist. 196 (emphasis added).

Senator Buckley's remarks demonstrate his reading of the Conference bill to bar the AEC from imposing "*any*" effluent limitation on its own authority. Such an observation would make little sense in relation to the AEC if the FWPCA did not apply to all radioactive materials.[34]

Following this remark Senator Buckley cited, by way of example, several news accounts of an AEC decision to require a closed cycle cooling system. Senator Buckley then asked two rapid-fire questions, (1) whether he was correct "that environmentalists will be barred from intervening in AEC licensing procedures in order to obtain tougher effluent limitations," and (2) whether environmentalists "particularly concerned about the effects of water pollution at, for instance the sites of proposed industrial power plants

[34]Petitioners have attempted to limit the persuasiveness of this discussion by claiming that it is related solely to thermal pollution. Brief for Petitioners, at 45 n. 33. However, Senator Buckley did not raise the question of thermal pollution (which he did only by way of example) until *after* this unqualified exchange had occurred.

are entirely at the mercy of EPA and the general, nationwide standards it has set?"

Senator Muskie responded:

> Mr. President, I am not sure I heard clearly all of the Senator's question, but if I may try to state it, the Senator is asking whether EPA, in its authority to set effluent limitations controls with respect to the subject matter which the Senator has raised, can set those limitations and whether the AEC has to accept them. The answer is yes.
>
> Mr. Buckley: The AEC is precluded from setting higher standards than those imposed by EPA.
>
> Mr. Muskie: Does the Senator mean more rigorous from an environmental standpoint? I must say that such an action by AEC is not a possibility that occurred to the conferees. It has not occurred to me in my experience over the years. We considered that this kind of authority should be in EPA and not in AEC, and in order to put the authority there, we put it in this act, and that is where it is.
>
> Mr. Buckley: It is not the intention of the conference committee to exclude the right of other regulatory bodies to impose more stringent environmental conditions on discharges?
>
> Mr. Muskie: Again I must say yes, we gave the authority to EPA. The whole concept of EPA is that environmental considerations are to be determined in one place by an agency whose sole mission is protection of the environment. It did not occur to us that AEC might be more conscientious in this respect than EPA, so we have given EPA the total authority on the assumption that the risk from AEC was not of the nature de-

scribed by the Senator but, rather, the opposite, as history demonstrates.

1 Leg. Hist. 198.

The sweep of the discussion fully establishes the underlying assumption of both Senators that under the Conference Committee's bill, EPA would have the basic responsibility to set effluent limitations over radioactive materials and that those limits would have to be accepted by the AEC. If some portion of the AEC's ability to set effluent limitations was to be preserved, it would surely have emerged during this lengthy and somewhat repetitious dialogue.

Indeed, it is remarkable that during the Senate debate on the Conference report the AEC served no less than *four* times as the example of a federal agency whose authority in setting effluent limitations would yield under the FWPCA to EPA. *See, e.g.*, 1 Leg. Hist. 183 (Statement of Senator Muskie); 1 Leg. Hist. 198 (Senator Buckley); 1 Leg. Hist. 202 (Statement of Senator Jackson); 1 Leg. Hist. 205 (Statement of Senator Jackson).

In summary, respondents believe the legislative history reveals a consistent position on the part of the Senate to create a comprehensive water pollution control statute that would cover radioactive materials in the same fashion as every other waste material. Respondents believe the Conference Committee adopted this approach and that the Senate adopted the Conference bill without even the hint of an exemption for AEA-regulated materials. While the

forces favoring such an exception were obviously stronger in the House, even there they did not succeed in winning approval of a statutory exception in Committee or on the floor. A narrow reading of a statutory phrase by a few members of one legislative branch, which was not adopted in Conference, cannot be used to limit the scope of the provision as adopted. *See United States v. Rohm and Haas Company,* 500 F.2d 167, 173 (5th Cir. 1974), *cert. denied,* 420 U.S. 962 (1975); *Davidson v. Gardner,* 370 F.2d 803, 828 (6th Cir. 1966).

Thus, respondents respectfully submit that for this Court to create such an exception now by relying upon unsupportive legislative history would most inappropriately reverse a carefully considered and properly made legislative decision. Or, as well stated by Mr. Justice Rutledge: "The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction." *Gemsco, Inc. v. Walling,* 324 U.S. 244, 260 (1945). *See Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 412 n. 29 (1971) (Marshall, J.); *NLRB v. Plasterers' Local Union No. 79,* 404 U.S. 116, 129 n.24 (1971) (White, J.).

Moreover, the facts of the present case provide much weaker evidence of congressional intent than the Court confronted and rejected in *Train v. New York, supra.* There, the Court also examined the legislative history of the FWPCA to determine whether Con-

gress intended to give the President discretion to impound funds authorized for construction grants for certain municipal sewers and sewage treatment works. In that case, the Conference Committee had actually made some adjustments to the statutory language. 420 U.S., at 44. Yet the Court declined to read significance into this change, holding that "if Congress intended to confer any discretion on the Executive to withhold funds from this program at the allotment stage, it chose quite inadequate means to do so." *Id.* Writing for the Court, Justice White remarked: "But legislative intention, without more, is not legislation." 420 U.S., at 45.

Even the most forced reading of these congressional materials can unearth no more than an inchoate intent manifested only by some members of one branch. This intent, if that is what it is, can certainly not be said to have reached the levels of "legislation," particularly when measured against the standard of *Train v. New York*.

In sum, the legislative history of the FWPCA simply provides no basis for overriding the unambiguous statutory language of the Act, which defines "pollutant" to include all radioactive materials.

III. REGULATION OF RADIOACTIVE MATERIALS AS A POLLUTANT UNDER THE FWPCA WILL ELIMINATE PRESENT OVERLAPPING AUTHORITY AMONG EPA, NRC AND ERDA.

Petitioners advance a number of policy arguments in urging this Court to carve out an exception from the FWPCA for AEA-regulated radioactive materials.

Primarily petitioners contend that regulation of these effluents under the FWPCA would produce a "redundant" regulatory scheme. Brief for Petitioners, at 49. These arguments do not withstand scrutiny and ignore Congress' reasons for enacting the FWPCA as well as the current complexities of the relationship between NRC, ERDA and EPA.

A. Reliance On EPA's Extensive Radiation Protection Expertise To Set Effluent Limitations For Radioactive Materials Under The FWPCA Finally Ends, And Certainly Does Not Create, Redundant Regulation.

The FWPCA transferred the authority to set effluent limitations from the AEC to EPA. No "redundant" regulatory scheme is created: EPA simply sets discharge limits under the FWPCA as it does for all other industries including all other energy technologies. Indeed, giving EPA the authority to set effluent limits finally places in one agency coherent regulatory authority for controlling the release of radioactive materials into water.

1. EPA has extensive authority and experience in radiation protection.

From its inception, EPA has had broad responsibility to establish standards for the release of all radioactive materials into the environment. The Presidential order that established EPA, Reorganization Plan No. 3 of 1970, §§ 2(a)(6)-(7), 2(a)(3)(C), 84 Stat. 2086, 42 U.S.C. § 4321 (1970), gave EPA major responsibilities in the field of radiation protection, transferring to EPA authority and personnel from other agencies including the AEC. The authority

transferred included: (1) the functions of the Atomic Energy Commission's Division of Radiation Protection Standards to set generally applicable standards for the protection of the general environment from radioactive material; (2) all functions of the Federal Radiation Council which included advising "the President with respect to radiation matters, directly or indirectly affecting health, including guidance for all Federal agencies in the formulation of radiation standards . . ." 42 U.S.C. § 2021(h) (1970); and (3) many of the duties of the Bureau of Radiological Health, including review and evaluation of the public health factors of all nuclear facilities, assessment of population exposures to radiation, and assessment of radiation levels in the environment.[35]

Congress has added to EPA's radiation protection responsibilities not only in the FWPCA, but also in the Safe Drinking Water Act, 42 U.S.C.A. § 300(f)(6) (Supp. Feb., 1975) (EPA to regulate "contaminants" including "radiological substance or matter"). EPA's technical ability to establish standards for radioactive discharges from nuclear power plants can hardly be questioned.

[35]Bureau of Radiological Health, *ops. cit., supra* note 26. To carry out its broad radiation protection responsibilities, EPA has established an Office of Radiation which

> . . . . is responsible . . . for the radiation activities of the Agency, including development of radiation protection criteria, standards, and policies; development of methodology for measuring and controlling radiation exposure; development of research requirements for radiation programs; provision of technical assistance to States and other agencies having radiation protection programs; establishment and direction of a national surveillance and inspection program for measuring radiation levels in the environment; evaluation and assessment of the impact of new and developing radiation technology on man and the environment; assistance in the training of personnel for radiation protection programs in the States and for other purposes; and maintenance of liaison with other public and private organizations interested in environmental radiation.
>
> 40 C.F.R. § 1.29 (1975).

2. To implement efficiently EPA's general environmental radiation standards, the NPDES permits that EPA already issues to all point source nuclear power facilities should include effluent limits for all radioactive materials.

Since it was established, EPA has utilized its extensive radiation protection expertise and authority to set general radiation standards which limit the total amount of radioactivity discharged from major categories of sources. *See, e.g.,* 40 Fed. Reg. 23419 (May 29, 1975). However, with NRC setting effluent limits for commercial nuclear facilities and with ERDA setting effluent limits for government nuclear facilities, the present regulatory scheme creates overlapping and potentially conflicting authority. Petitioners, in discussing NRC, admit that constant effort is necessary

> lest AEC [NRC] license discharges resulting in degradation of the environment in excess of standards established by EPA, or EPA establish standards so stringent that they would require the AEC [NRC] to impose unattainable limitations on discharges from nuclear facilities.
>
> Brief for Petitioners, at 53.

The FWPCA finally unites in one agency the authority to set both the general environmental standards and the effluent limitations for individual sources that implement these standards—a significant improvement from the standpoint of administrative effectiveness.

Moreover, regulation of all radioactive materials under the FWPCA would involve no additional permits and no additional proceedings. As petitioners concede, every nuclear facility already must obtain a permit under the FWPCA. Reply Memorandum (on Petition for Certiorari) for Petitioners, at 1-2. At present, these permits are illogically and improperly limited to setting effluent limits under the FWPCA for thermal and non-radiological pollutants. Thus, including radioactive materials within the ambit of the FWPCA will neither increase nor decrease the number of permit applications. It will merely rationalize and centralize the authority over the discharge of radioactive materials and other pollutants into water in the EPA, as Congress intended.[36]

[36]Respondents note that the petitioners have now dropped any claim that EPA regulation would adversely affect the "energy crisis." Since the present case involves solely a question of congressional intent, such policy arguments are, in any event, more appropriately directed to Congress. In fact, however, Congress has already explicitly addressed the issue in the FWPCA and directed EPA to take energy requirements into account in setting effluent limitations. 33 U.S.C. §§ 1314(b)(1)(B), (b)(2)(B), and 1316 (b)(1)(B) (Supp. II, 1972). Moreover, as discussed in the text, regulation under the FWPCA would streamline the regulatory process, lending little support to any claim of adverse impact. Furthermore, it is strange for an industry that continues to tout itself as the coming source of "clean" energy to claim suddenly that environmental regulation equivalent to that imposed on all other energy technologies will cause it special difficulty.

B. The FWPCA Establishes An Elaborate System For Determining Appropriate Effluent Limitations Which Congress Intended Should Apply Uniformly To All Industries.

Unlike the amorphous "health and safety" standard of the Atomic Energy Act, which nowhere explicitly provides for the setting of effluent limitations, the FWPCA focuses on stimulating industry to develop and install more effective pollution control technology, and creates a rigorously detailed regulatory mechanism to achieve this goal. The FWPCA establishes a specific enforcement mechanism to ensure that water quality standards are attained. 33 U.S.C. § 1313 (Supp. II, 1972). It formulates one set of standards for existing point sources and another for new sources. 33 U.S.C. §§ 1311(a), 1316 (Supp. II, 1972). It sets out elaborate procedures and methods for determining what constitutes "the best practicable" and "the best available" technology. *Id.*

Plainly Congress intended that EPA determine effluent limitations, according to the FWPCA standards, for all industries. Moreover, Congress intended that EPA's authority under the FWPCA prevail in general over the authority of other agencies and specifically over the authority of the AEC.

> Section [1371(c)(2)] addresses itself to the authority of Federal licensing and permitting agencies, other than EPA, as relates to effluent limitations and other requirements established pursuant to the FWPCA. *EPA is the sole Federal agency specifically charged with comprehensive responsibility to regulate the discharge of pollutants into the waters of the United States, and*

> ***Section [1371(c)(2)] will ensure that no source of discharge which is in lawful compliance with an effluent limitation established pursuant to the FWPCA will be required to meet a different standard as a condition of a license or permit granted by another Federal agency, such as the Atomic Energy Commission.***
>
> 1 Leg. Hist. 183 (emphasis added). (Senator Muskie's prepared summary of Conference bill).

In an analogous case, the Second Circuit held that the FWPCA's comprehensive control scheme took precedence over the authority of a federal licensing agency, the Federal Power Commission (FPC). *Scenic Hudson Preservation Conference v. Callaway,* 370 F. Supp. 162 (S.D.N.Y.) (Lasker, J.), *aff'd per curiam,* 449 F.2d 127 (2d Cir. 1974). The plaintiffs in *Scenic Hudson* claimed that the Storm King hydroelectric project was required to obtain a dredge and fill permit under the FWPCA. 33 U.S.C. § 1344(a) (Supp. II, 1972). Consolidated Edison, owner of the facility, argued that the project was exempt from the FWPCA because the "Federal Power Act vests *exclusive* jurisdiction over hydroelectric plants in the FPC and denies any other Federal agency licensing power over projects within its jurisdiction." 370 F. Supp., at 165 (emphasis in original). The court stressed the all-encompassing nature of the FWPCA:

> . . . Con Ed would infer an exception from the [FWPCA] for hydroelectric plants on the theory that Congress could not have intended to interfere with the jurisdiction of the FPC in view of

> the long settled policy, discussed above, of allowing that agency unique control over the production of hydroelectric power. The argument is persuasive at first blush, but even more plausible is plaintiffs' contention that Congress would not design an Act which on its face is all-inclusive, but for specifically enumerated exceptions, and yet intend to establish an unmentioned exception of the scale suggested here. Without any indication that Con Ed's reading of the Congressional will is accurate, the carving out of so major an exception would be improper. If this was Congress' intention and the omission is mere oversight, the remedy rests in Congress' hands, and Congress has shown, by its recent amendments to the Alaska pipeline legislation, that it will not hesitate to remove an obstacle to energy production when it believes a change of requirements is necessary in the public interest.
>
> *Id.,* at 170.

To exempt AEA-regulated radioactive materials from EPA's cognizance would seriously breach the uniform system of regulation envisioned by the FWPCA. It would create a dual standard for release of materials into water — one for all pollutants under the FWPCA and another, unique standard for radioactive materials under the Atomic Energy Act. It is the present regulatory scheme that creates a redundant and indeed conflicting pattern of regulation.

This Court should not hesitate to give the term "radioactive materials" in the FWPCA its plain and natural meaning and to honor Congress' intent to

empower EPA to protect the "radiological integrity" of the nation's waters.[37]

[37] Despite occasional hints by petitioners to the contrary, this case does not involve any issue decided in *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972). The Eighth Circuit held in *Northern States Power* that the Atomic Energy Act preempted the states from regulating radioactive effluents from nuclear power plants and that holding was affirmed without opinion by this Court, two Justices dissenting. Respondents respectfully submit that *Northern States Power* has no bearing on this case or on the role the states may play in regulating, under the FWPCA, the discharge of radioactive materials into water.

In respondents' view, the discharge of radioactive materials into water is now regulated by the FWPCA, not by the Atomic Energy Act. Therefore, the question of preemption of the states' authority to set effluent limitations over the discharge of radioactive materials into water must now be viewed in the context of the FWPCA, rather than the Atomic Energy Act. In general, 33 U.S.C. § 1370 (Supp. II, 1972) of the FWPCA provides that the FWPCA does not preempt the states from enforcing more stringent effluent limitations than those set by EPA. However, a careful analysis of the FWPCA and its legislative history is necessary to determine whether Congress, under the FWPCA, intended to create an exception to Section 1370 with regard to radioactive materials and intended to preempt the states from setting more stringent standards than EPA's effluent guidelines.

But however the question of preemption is decided under the FWPCA, it has no bearing on the scope of the term "radioactive materials" and the decision whether these materials are included within the FWPCA's definition of pollutant. If the states are not preempted under the FWPCA from setting more stringent standards for the discharge of radioactive materials, the FWPCA's regulatory mechanism will operate exactly as it does now with regard to all other pollutants. If the states are preempted, then the FWPCA's regulatory mechanism will still operate with regard to radioactive materials as it does now for all other pollutants except that the states will be able to enforce only EPA-set effluent limitations and will not be able to set more stringent standards.

Respondents have not briefed the preemption question since the issue is not now before the Court. The complaint in this case seeks a declaratory judgment that all radioactive materials are regulated by the FWPCA and an order requiring EPA to exercise its authority under the Act to regulate such materials. Appendix, at 14. The states' power to set higher standards than EPA's is in no way involved. Resolution of that issue—if it arises—must appropriately await a future case posing the issue in a concrete fact situation.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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September, 1975.

No. 74-1270

In the Supreme Court of the United States

OCTOBER TERM, 1975

RUSSELL TRAIN, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS,

v.

COLORADO PUBLIC INTEREST RESEARCH GROUP, INC., ET AL., RESPONDENTS.

BRIEF AMICUS CURIAE ON BEHALF OF BOSTON EDISON COMPANY, CAROLINA POWER & LIGHT COMPANY, CENTRAL MAINE POWER COMPANY, COMMONWEALTH EDISON COMPANY, THE CONNECTICUT LIGHT AND POWER COMPANY, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., THE DETROIT EDISON COMPANY, THE HARTFORD ELECTRIC LIGHT COMPANY, ILLINOIS POWER COMPANY, LOUISIANA POWER & LIGHT COMPANY, MAINE YANKEE ATOMIC POWER COMPANY, NEW ENGLAND POWER COMPANY, NIAGARA-MOHAWK POWER CORPORATION, NORTHEAST NUCLEAR ENERGY COMPANY, NORTHERN STATES POWER COMPANY, OMAHA PUBLIC POWER DISTRICT, POWER AUTHORITY OF THE STATE OF NEW YORK, PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, ROCHESTER GAS & ELECTRIC CORPORATION, SOUTHERN CALIFORNIA EDISON COMPANY, UNION ELECTRIC COMPANY, VERMONT YANKEE NUCLEAR POWER CORPORATION, WESTERN MASSACHUSETTS ELECTRIC COMPANY, WISCONSIN ELECTRIC POWER COMPANY AND YANKEE ATOMIC ELECTRIC COMPANY

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In the Supreme Court of the United States

OCTOBER TERM, 1975

RUSSELL TRAIN, Administrator of the Environmental Protection Agency, et al.
Petitioners,
v.
COLORADO PUBLIC INTEREST RESEARCH GROUP, INC., et al.
Respondents.

No. 74-1270

BRIEF AMICUS CURIAE ON BEHALF OF BOSTON EDISON COMPANY, CAROLINA POWER & LIGHT COMPANY, CENTRAL MAINE POWER COMPANY, COMMONWEALTH EDISON COMPANY, THE CONNECTICUT LIGHT AND POWER COMPANY, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., THE DETROIT EDISON COMPANY, THE HARTFORD ELECTRIC LIGHT COMPANY, ILLINOIS POWER COMPANY, LOUISIANA POWER & LIGHT COMPANY, MAINE YANKEE ATOMIC POWER COMPANY, NEW ENGLAND POWER COMPANY, NIAGARA-MOHAWK POWER CORPORATION, NORTHEAST NUCLEAR ENERGY COMPANY, NORTHERN STATES POWER COMPANY, OMAHA PUBLIC POWER DISTRICT, POWER AUTHORITY OF THE STATE OF NEW YORK, PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, ROCHESTER GAS & ELECTRIC CORPORATION, SOUTHERN CALIFORNIA EDISON COMPANY, UNION ELECTRIC COMPANY, VERMONT YANKEE NUCLEAR POWER CORPORATION, WESTERN MASSACHUSETTS ELECTRIC COMPANY, WISCONSIN ELECTRIC POWER COMPANY AND YANKEE ATOMIC ELECTRIC COMPANY

INTRODUCTION

Boston Edison Company, Carolina Power & Light Company, Central Maine Power Company, Commonwealth Edison Company, The Connecticut Light and Power Company, Consolidated Edison Company of New York, Inc., The Detroit Edison Company, The Hartford Electric Light Company, Illinois Power Company, Louisi-

ana Power & Light Company, Maine Yankee Atomic Power Company, New England Power Company, Niagara-Mohawk Power Corporation, Northeast Nuclear Energy Company, Northern States Power Company, Omaha Public Power District, Power Authority of the State of New York, Public Service Company of New Hampshire, Rochester Gas & Electric Corporation, Southern California Edison Company, Union Electric Company, Vermont Yankee Nuclear Power Corporation, Western Massachusetts Electric Company, Wisconsin Electric Power Company and Yankee Atomic Electric Company ("Utilities"), are filing this brief *amicus curiae* with the consent of both Petitioners and Respondents. Letters evidencing such consent have been filed with the Clerk of this Court.

The Court of Appeals for the Tenth Circuit has held that the Federal Water Pollution Control Act Amendments of 1972 ("FWPCA" or "Act"), 86 Stat. 816, 33 U.S.C. §§1251 *et seq.* (Supp. II, 1972), requires the Administrator of the Environmental Protection Agency ("EPA") to regulate liquid nuclear wastes from facilities such as nuclear power plants, notwithstanding comprehensive control of such wastes by the Nuclear Regulatory Commission ("NRC") pursuant to the Atomic Energy Act of 1954, as amended, 68 Stat. 919, 42 U.S.C. §§2011 *et seq.* (1970) (the "Atomic Energy Act").[1] *Colorado Public Interest Research Group* v. *Train*, 507 F.2d 743

[1]Pursuant to the Energy Reorganization Act of 1974, 88 Stat. 1233, 42 U.S.C.A. §§5801 *et. seq.* (Supp. Feb., 1975), the NRC succeeded to the regulatory functions of the Atomic Energy Commission ("AEC"). Accordingly, references to the NRC or to the activities of the NRC may apply to the AEC as well. However, specific references to the AEC are used when the context so requires.

(10th Cir. 1974). This decision is based on the Tenth Circuit's interpretation of Section 502(6) of the FWPCA, 33 U.S.C. §1362(6) (Supp. II, 1972), which includes the words "radioactive materials" in the definition of the term "pollutant."[2] This Court issued a Writ of Certiorari to the Tenth Circuit to review that decision on June 2, 1975.

Utilities believe that the opinion of the Tenth Circuit is erroneous and will, unless reversed by this Court, lead to duplicative and potentially disruptive regulation of nuclear power plants, to the detriment of national energy goals and in opposition to clearly expressed Congressional intent. Accordingly, Utilities support the position of the Petitioners herein, and urge this Court to reverse the decision of the Tenth Circuit.

INTEREST OF UTILITIES

Each of the Utilities holds an interest in one or more nuclear power plants for which construction permits or

[2]The full definition is as follows:

> The term 'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) 'sewage from vessels' within the meaning of section 312 of this Act; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

FWPCA Section 502(6), 86 Stat. 816, 33 U.S.C. §1362(6) (Supp. II, 1972).

operating licenses have been issued or applications are pending before the NRC.[3] Utilities are, therefore, heavily involved in providing electricity to their customers by means of nuclear energy and have spent billions of dollars and will be required to spend further billions of dollars pursuant to that commitment. They have a special interest here because the immediate effect of the Tenth Circuit opinion will be the severe disruption of the process for licensing these plants and of future service to their more than 17 million customers. Utilities, unlike EPA, have actual experience with the complexity of regulating nuclear wastes and with the burdens inherent in multi-layered regulation.

The opinion of the Tenth Circuit may seriously affect the continued operation and scheduled construction of nuclear power plants by imposing redundant and potentially conflicting regulation with respect to discharges of liquid nuclear wastes. Because of the sophisticated technology involved, such regulation requires in-depth consideration of all aspects of the design and operation of nuclear power plants. Indeed, since reducing liquid nuclear wastes generally increases nuclear wastes in solid form, which are also regulated by the NRC, overlapping regulation of liquid wastes pursuant to the FWPCA may conflict with NRC policies in related areas or prevent the design of nuclear power plants which meet requirements

[3]The number of customers served by Utilities, the percentage of Utilities' capacity served by nuclear power plants, the number and capacity of the nuclear facilities to which Utilities are committed, and the anticipated service dates of units presently uncompleted are set forth in Appendix A.

under both the FWPCA and the Atomic Energy Act. The delay in obtaining permits or permit renewals and other consequences to Utilities' operations which are threatened by the Tenth Circuit opinion are wholly inconsistent with the obligation of Utilities to serve their customers and with the declared national policy of conserving fossil fuel resources and developing energy sources not dependent upon foreign governments. The additional layers of regulation which will flow from the Tenth Circuit decision are inconsistent with the expressed intent of Congress and provide no benefits to the public to offset these social and economic costs.

SUMMARY OF ARGUMENT

Ironically, despite the fact that one of the objectives of the FWPCA is to reduce duplicative and overlapping regulation, the interpretation of that statute by the court below would have precisely that effect. It would sow confusion, stimulate litigation, inhibit industrial development, frustrate national energy policy and foster redundant regulation to an unprecedented degree. The decision of the Tenth Circuit ignores the consequences of its interpretation of the FWPCA on a vital component of the nation's plan for energy self-sufficiency, nuclear power plants. Such plants are extremely complex and costly industrial facilities, which take many years to construct. Nuclear power plants are presently subject to rigorous regulation by federal, state and local authorities of all aspects of their design, construction and operation. Until the decision of the Tenth Circuit, however, control of the use of source, by-product and special nuclear materials in

such power plants was confined to one federal agency, the NRC.[4]

At issue is whether exclusive regulation of the use and discharge in a liquid form of source, by-product, and special nuclear materials ("liquid nuclear wastes") from nuclear power plants and other production and utilization facilities is to be left with the NRC.[5] The Tenth Circuit says not, relying upon one phrase which appears in the FWPCA. In construing this one phrase (in FWPCA Section 502(6), *supra* note 2, which includes "radioactive materials" in the definition of "pollutants"), the Tenth Circuit has entirely disregarded the separate histories, aims and structures of the two statutes which it should have harmonized, the FWPCA and the Atomic Energy Act.

[4]The Atomic Energy Act defines the terms "byproduct material," "source material" and "special nuclear material" as follows:

> The term 'byproduct material' means any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material.
>
> The term 'source material' means (1) uranium, thorium, or any other material which is determined by the Commission pursuant to the provisions of section 61 to be source material; or (2) ores containing one or more of the foregoing materials, in such concentration as the Commission may by regulation determine from time to time.
>
> The term 'special nuclear material' means (1) plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material which the Commission, pursuant to the provisions of section 51, determines to be special nuclear material, but does not include source material; or (2) any material artificially enriched by any of the foregoing, but does not include source material.

Atomic Energy Act of 1954, 68 Stat. 919, as amended, Section 11(e), (z), (aa), 42 U.S.C. §2014 (e), (z), (aa) (1970).

[5]*Id.*, Section 11(v), (cc), 42 U.S.C. §2014 (v), (cc) (1970).

The NRC's exclusive regulation of radioactive materials used in nuclear power plants is the result of a carefully considered legislative plan which derives from the development of nuclear energy in World War II and subsequent federal development of nuclear energy for peacetime use. Congress, recognizing both the potential for harm to the public health and safety from unrestricted access to radioactive materials and the complexities inherent in regulating such substances, has consistently expressed its will that NRC regulation be comprehensive and free from conflicting or redundant regulation by any other governmental agency. That congressional purpose is found in the language of the Atomic Energy Act, subsequent enactments dealing with the regulatory role of the NRC, and the legislative history which preceded the passage of those statutes. The exclusivity of NRC control of radioactive materials used in nuclear power plants was confirmed in *Northern States Power Co.* v. *Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972), where the Court of Appeals held that the Atomic Energy Act pre-empted state regulation of the very substances involved in this litigation, liquid nuclear wastes from nuclear power plants. Thus, until the decision of the court below, it was clear that NRC was not to share its jurisdiction with any other agency, federal or state.

The FWPCA proceeds on premises which are very different from those which underlie the Atomic Energy Act. Knowledge about pollution control equipment and the effect of pollution is disseminated among the various governmental levels and between governmental and non-governmental experts. The subject of regulation, water pollu-

tion, has been regulated by the states for many years and the gradually evolving federal involvement in the field has had as its purpose achieving certain objectives by relying upon rather than supplanting state regulation. Accordingly, among the legislative goals expressed in the FWPCA is large-scale participation by the states in regulating water pollution. To that end, state certification of compliance by industrial facilities with EPA-established effluent guidelines and state administration of a federally-mandated permit program are contemplated by the FWPCA. The Tenth Circuit failed to adequately analyze the FWPCA and its interplay with the Atomic Energy Act, as construed in *Northern States*. Instead, the court held simplistically that the Atomic Energy Act was "inconsistent" with, and hence subject to, the FWPCA. 507 F.2d at 748. Thus, the Tenth Circuit decision would be merely the precursor to additional litigation attempting to adjust the state regulatory role under the FWPCA with the prior limitation on state power in this area set forth in *Northern States*. Until this resolution occurs, nuclear power plant construction, operation and licensing would lag, all to the detriment of the national goal of energy self-sufficiency.

The court below dismissed the legislative history of the FWPCA as "inconclusive" and observed that use of legislative history as an aid to construction was inappropriate since the words "radioactive materials" in Section 502(6) of the FWPCA, 33 U.S.C. §1362(6) (Supp. II, 1972), have an "obvious meaning." 507 F.2d at 747. However, the so-called "plain meaning" rule of statutory con-

struction does not bar resort to legislative history in this case. Moreover, in view of the accommodation between the FWPCA and the Atomic Energy Act which is necessary, use of the legislative history is particularly important to resolve the potential clash between two federal statutes and to avoid the plainly unreasonable and bizarre results which flow from the Tenth Circuit's decision. Had the court reviewed the legislative history of the FWPCA, the express Congressional purpose to maintain exclusive NRC jurisdiction over liquid nuclear wastes from nuclear power plants would have been apparent.

Finally, the Tenth Circuit failed to give proper weight to EPA's interpretation of its powers under the FWPCA. EPA has concluded that it lacks statutory authority to regulate liquid nuclear wastes from nuclear power plants. This administrative interpretation is in accord with a long-standing division of responsibility between EPA and NRC, whereby EPA establishes general standards for radioactivity in the environment and NRC promulgates specific regulations to assure that those standards are met by nuclear power plants. Thus, the present division of responsibility between EPA and NRC provides comprehensive, unified control of radioactive discharges. Superimposing the regulatory scheme contemplated by the FWPCA on existing NRC regulation would add nothing to the protection of the public health and safety or the environment, would be contrary to the express mandate of the FWPCA to eliminate duplicative regulation, and would be achieved only at the risk of disrupting the national goal of energy self-sufficiency.

ARGUMENT

I.

The Attainment of Major National Goals Requires Unified Regulation of the Radiological Aspects of Nuclear Power Plants.

The generation of electricity by means of nuclear power has progressed over the past two decades from experimental status to wide-scale commercial application and a corresponding vital role in the nation's energy supply. At the end of 1973, nuclear power plants represented about 4.7 per cent of the nation's generating capacity.[6] By 1985, the Federal Energy Administration estimates that electricity generated by nuclear power plants will account for 30 per cent of total generation.[7] This energy is expected to be derived from plants representing 22 to 24 per cent of total generating capacity.[8] In his State of the Union message, President Ford described a strategy for energy self-sufficiency within the next ten years which rests in part on placing 200 new nuclear power plants into operation.[9]

A nuclear power plant is an extremely costly and complex industrial facility. A new two-unit nuclear power station, having a typical generating capacity of about 2,000,000 kilowatts, costs in excess of $1 billion.[10] Such

[6]Federal Energy Admin., Project Independence Report 119, 127 (1974).

[7]*Id.* at 30.

[8]*Id.* at 127.

[9]121 Cong. Rec. H137 (daily ed. Jan. 15, 1975); *see also* Statement of Hon. John A. Hill, Deputy Adm'r., Federal Energy Admin., Before the Subcomm. on Energy and the Environment of the House Comm. on Interior and Insular Affairs, June 2, 1975.

[10]*See, e.g.*, Atomic Energy Comm'n, The Nuclear Industry: 1973, WASH-1174-73, Table 1-2, at 6 (1974); Nuclear Industry, Vol. 22, Jan., 1975, at 27.

costs are major components of a utility's construction budget. Delay in the scheduled operation of a nuclear power plant can be most serious. For example, one year's delay in the completion of a 2,000,000 kilowatt power station can have one or more of the following consequences:

(1) failure to meet customers' load requirements;
(2) escalated construction costs;
(3) costs of $40,000,000 to $175,000,000 in recent dollars or $50,000,000 to $280,000,000 in 1980 dollars due to the higher fuel cost of coal- or oil-fueled plants;
(4) consumption of as much as 20,000,000 barrels of oil if the capacity is replaced by generation at oil-fired units.[11]

A nuclear power plant typically consists of three major components: a nuclear steam supply system which produces steam by means of the heat resulting from the fission process; a turbine-generator which converts the steam into electricity; and a system for dissipating the waste

[11]Atomic Energy Comm'n, Comparative Risk-Cost-Benefit Study of Alternative Sources of Electrical Energy, WASH-1224, Table 1.1, at 1-7, and Table 5.4, at 5-7 (1974). Table 1.1 indicates that one unit having a capacity of 1,000 megawatts (1,000,000 kilowatts) operating at a 75 per cent capacity factor would produce 6,570,000,000 kilowatt hours per year, which would require 10,000,000 barrels of oil. The Table also contains projections of 1980 fuel costs of 6.0 mils per kilowatt hour for nuclear plants, 9.8 mils per kilowatt hour for coal-fueled plants and 27.4 mils per kilowatt hour for oil-fired plants. *See* Federal Energy Admin., Project Independence Report 286 (1974), which shows recent fuel costs of 2.50 mils per kilowatt hour for nuclear fuel, 5.56 for coal and 15.83 for oil. *See also* Remarks of Hon. Frank G. Zarb, Adm'r, Federal Energy Admin., Before the Commonwealth Club of California, S-75-231, July 11, 1975.

heat produced by the above process.[12] Quite apart from the special regulatory measures which must be taken because of the dangers of unconfined radioactivity associated with the operation of such plants, their size, complexity and interaction with the environment have brought into play a wide variety of federal, state and local regulation. Construction and operation of a nuclear power plant may require as many as 15 to 20 different permits.[13] These permits cover a wide range including, for example, NRC construction permits, certificates of public convenience and necessity from state public utilities commissions, water use permits from state pollution abatement agencies, and highway permits from county governments for the transportation of heavy equipment over local roads. While the scope of regulation is very broad, there has been no overlapping jurisdiction with respect to control of source, by-product and special nuclear materials contained in or released from nuclear power plants.

Nuclear power plants have a unique attribute which sets them apart from every other industrial facility, in terms of the need for comprehensive regulation of their operations. The operation of a nuclear power plant involves the control of large quantities of potentially hazardous and extremely persistent substances, the nuclear wastes and by-products which are created during the operation of the facility. The power plant must, therefore, be designed, constructed and operated so that

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[12] *See* Atomic Energy Comm'n, The Safety of Nuclear Power Reactors (Light Water-Cooled) and Related Facilities, WASH-1250, at 1-1 (1973).

[13] *See, e.g.*, Atomic Energy Comm'n, Final Environmental Statement, Braidwood Station, Docket Nos. STN 50-456 and STN 50-457, Table 1.1 (1974).

those individuals operating the plant are not exposed to harmful quantities of radioactivity; so that any low-level nuclear wastes released to the environment during routine operation do not jeopardize public health; and so that, in the unlikely event of an accident, the effects on the public of any release of nuclear material are mitigated. Regulatory control of the radiological aspects of the operation of nuclear power plants first involves establishing permissible exposure limits to power plant personnel and the public from radioactivity which may be released during normal operation or under accident conditions in gaseous or liquid form. Once exposure limits have been determined, design parameters for the nuclear power plant and its nuclear fuel are established which, in the judgment of the regulatory authority will control emissions of nuclear wastes so that the exposure limits are not exceeded if construction proceeds in accordance with the approved design. Different types of nuclear power plants in use today have operating characteristics which cause variations in the types of radionuclides released in the nuclear wastes, the form of such release (gaseous, liquid or solid) and the rate of the release. The manner in which a nuclear power plant is operated has an effect on the type and quantity of such releases as well.

In short, effective regulation of discharges of nuclear wastes from nuclear power plants from the standpoint of protecting the health and safety of the public requires an intimate knowledge of all aspects of the design, construction and operation of a nuclear power plant. Further, the nation's increasing reliance on electricity generated by nuclear power, together with the huge sums of money invested in or committed to nuclear power plants by pub-

lic utilities, demand that regulation of nuclear power plants be consistent, unified and timely, so that the impact of such regulation can be factored into the decision to build a nuclear power plant in the first instance and that construction and operation will proceed in an orderly fashion. As we show in the next section of the brief, Congress has responded to this perceived need for unified regulation of all nuclear materials, including liquid nuclear wastes. Since 1946, Congress has adhered to a consistent legislative strategy for regulating nuclear materials, which confines such regulation to the NRC.

II.

The Atomic Energy Act Contemplates Comprehensive Regulation by the NRC of All Source, By-Product and Special Nuclear Material in Liquid Nuclear Wastes.

A. The NRC has been granted an exclusive Congressional mandate to regulate all radiological aspects of nuclear power plants.

A review of the evolution of NRC's regulatory authority demonstrates the unique and exclusive nature of its charter. Congress began its regulation of atomic energy with the passage of the Atomic Energy Act of 1946, 60 Stat. 755. That Act provided that the Atomic Energy Commission would own all nuclear facilities and the special nuclear material produced by or used in them. The federal monopoly over atomic energy materials and facilities for non-military activities derived in part from the costly capital investment required for the development of nuclear technology, and in part from the widespread

recognition that nuclear materials were highly dangerous and required the most careful control.[14]

This legislative framework was reviewed and thoroughly revised by Congress in 1954 to provide for the anticipated wide-scale construction and operation of nuclear power plants. Atomic Energy Act of 1954, 68 Stat. 919, 42 U.S.C. §§2011 *et seq.* (1970). Congress eliminated AEC's exclusive ownership of nuclear facilities, but retained ultimate AEC control over nuclear development to ensure that "greater private participation in power and development need not bring with it attendant hazards to the health and safety of the American people." S. Rep. No. 1699, 83d Cong., 2d Sess. 3 (1954); H. R. Rep. No. 2181, 83 Cong., 2d Sess. 3 (1954). The arrangement settled upon by Congress was a program of private ownership of nuclear facilities under license by the Commission. Thus, private interests were permitted for the first time to own and operate nuclear production and utilization facilities, as licensed by the AEC. Atomic Energy Act of 1954, 68 Stat. 919, Section 103, 42 U.S.C. §2133 (1970). In other words, the principle of federal ownership of nuclear facilities and special nuclear materials was altered only to the extent of allowing private ownership under license, and the principle of unified federal control over all aspects of atomic energy was to continue

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[14]The Senate Report that accompanies the 1946 legislation emphasized that an absolute government monopoly of production of fissionable material was justified, in part, by the fact that such production "is attended by serious hazards to public health and safety. The responsibility for minimizing these hazards is clearly a governmental function." S. Rep. No. 1211, 79th Cong., 2d Sess. 14 (1946).

through very rigorous licensing procedures. *See Id.*, Section 182, 42 U.S.C. §2232 (1970).[15]

In enacting the Atomic Energy Act of 1954, Congress declared that "[t]he processing and utilization of source, byproduct, and special nuclear material . . . must be regulated in the national interest." Atomic Energy Act of 1954, 68 Stat. 919, Section 2(d), 42 U.S.C. §2012(d) (1970). It further stated that "regulation by the United States of the production and utilization of atomic energy and of the facilities used in connection therewith is necessary in the national interest to assure the common defense and security and to protect the health and safety of the public." *Id.*, Section 2(e), 42 U.S.C. §2012(e) (1970). The Act authorized the AEC to "establish by rule, regulation, or order, such standards and instructions to govern the possession and use of special nuclear material, source material, and byproduct material as the Commission may deem necessary or desirable to promote the common defense and security or to protect health or to minimize danger to life or property." *Id.*, Section 161(b), 42 U.S.C. §2201(b) (1970). As described by one court of appeals, the Atomic Energy Act of 1954 established "a regulatory scheme which is virtually unique in the degree to which broad responsibility is reposed in the administering agency . . . ." *Siegel* v. *Atomic Energy Comm'n*, 400 F.2d 778, 783 (D.C. Cir. 1968).

[15]The licensing procedure under the 1954 Act as interpreted by the AEC was reviewed and approved by this Court in *Power Reactor Dev. Co.* v. *International Union of Elec., Radio & Machine Workers*, 367 U.S. 396 (1961). The Court there found that the AEC's responsibility for safeguarding public health and safety was to be exercised through a step-by-step procedure, in which a construction permit would first be issued, based on AEC's finding pursuant to 10 C.F.R. §50.35 of "reasonable assurance that a facility . . . can be constructed and operated . . . without undue risk to the health and safety of the public . . ." *Id.* at 406. Thereafter, an operating license could be issued based on the AEC's finding pursuant to Section 182(a) of the Act, 42 U.S.C. §2232(a) (1970), that the facility "will 'provide adequate protection to the health and safety of the public.' " *Id.* at 405-06. The multiple safeguards of this step-by-step procedure were approved as meeting the "high safety standards imposed by" Congress. *Id.* at 415. NRC's administrative procedures have on several subsequent occasions been found to satisfy constitutional and statutory requirements. *E.g., Union of Concerned Scientists* v. *Atomic Energy Comm'n*, 499 F.2d 1069 (D.C. Cir. 1974).

Congress evidenced its particular concern for continuing oversight of the AEC's activities by establishing the Joint Committee on Atomic Energy, which has taken an active role in keeping abreast of AEC activities. Atomic Energy Act of 1954, 68 Stat. 919, Section 201, 42 U.S.C. §2251 (1970). This Court has described the Joint Committee as a body with a "peculiar responsibility and place . . . in the statutory scheme," since it closely oversees the AEC's activities in the atomic energy field. *Power Reactor Development Co.* v. *International Union of Elec., Radio & Machine Workers*, 367 U.S. 396, 409 (1961). Thus, the Joint Committee on Atomic Energy has uniformly emphasized the AEC's responsibility to ensure that nuclear power plants and other production and utilization facilities are developed and operated consistently with radiological safety.[16] Pursuant to its statutory mandate,

[16]*See, e.g.*, Staff of Jt. Comm. on Atomic Energy, A Study of Atomic Energy Commission Procedures and Organization and the Licensing of Reactor Facilities, 85th Cong., 1st Sess. 4 (Comm. Print 1957):

> The special problem of safety in the atomic field is the consequence of the hazards, created by potentially harmful radiation attendant upon atomic energy operations.

the Joint Committee has held numerous hearings to investigate the AEC's regulatory activities, and from time to time has issued reports and studies that have recommended changes in AEC procedures and policies. The Joint Committee has examined AEC and NRC regulation of nuclear power plants in detail to be certain that such plants are licensed and operated in accordance with radiological safety standards.[17]

On several occasions since the 1954 enactment, Congress has amended the Atomic Energy Act without, however, abandoning the principle of unified and comprehensive control in a single federal agency. Thus, in 1959, provisions were approved for agreements whereby the AEC would transfer to qualifying states certain regulatory authority over by-product, source and special nuclear materials within their boundaries in quantities not sufficient to form a critical mass. Atomic Energy Act of 1954, as amended, Section 274, 73 Stat. 688, 42 U.S.C. §2021

[17] *See, e.g.*, Hearings on the Environmental Effects of Producing Electric Power Before the Jt. Comm. on Atomic Energy, 91st Cong., 1 Sess., pts. 1 and 2 (Vol. I and II) (1969); Hearings on AEC Licensing Procedure and Related Legislation Before the Subcomm. on Legislation of the Jt. Comm. on Atomic Energy, 92d Cong., 1st Sess., pts. 1–4 (1971); Hearings on Nuclear Power Plant Siting and Licensing Before the Jt. Comm. on Atomic Energy, 93d Cong., 2d Sess. (Vol. I and II) (1974); Hearings on Nuclear Reactor Safety Before the Jt. Comm. on Atomic Energy, 93d Cong., 1st Sess., pts. 1 and 2 (Vol. I and II) (1973). Most recently, the Joint Committee on Atomic Energy has emphasized that "NRC's regulation must be in the overall public interest, including public health and safety, the environment, and relevant social, economic, and common-defense and security factors." The Committee recommended that NRC's appropriations be increased so that it could expand its regulatory activities. S. Rep. No. 94-260, 94th Cong., 1st Sess. 3 (June 4, 1975).

(1970).[18] Significantly, however, Section 274 directs the Commission to retain authority and responsibility for the regulation of the construction and operation of production or utilization facilities. Congress, in other words, expressly precluded the states from entering this field. AEC control over such facilities including nuclear power plants necessarily includes control over the discharge of nuclear wastes from such facilities as an incident to their operation. In analyzing this Section in hearings before the Joint Committee, Mr. Robert Lowenstein, speaking on behalf of the Office of the General Counsel of the AEC, explained:

> Coming to the question you asked before, Mr. Ramey [Executive Director, Joint Committee], the purpose of this provision is to retain under Commission regulatory control the operation of the reactor. We did not feel that we could begin to cut up that into pieces, so to speak. The discharge of effluent from the reactor involves many questions relating to the design and construction and operating procedures.

Hearings on Atomic Energy—Cooperation with the States Before the Jt. Comm. on Atomic Energy, 86th Cong., 1st Sess. 306 (1959). The Joint Committee's reports to the House and Senate which accompanied this legislation were unequivocal. They stated that:

> Licensing and regulation of more dangerous activities —such as nuclear reactors—will remain the exclusive responsibility of the Commission. . . . *It is not intended to leave any room for the exercise of dual or concurrent jurisdiction.* . . . The intent is to have the material regulated

[18] The State must show the AEC that it has a regulatory program that is adequate to protect the public health and safety and is compatible with the AEC's regulatory program for such materials. *Id.*

and licensed either by the Commission, or by the State and local governments, but not by both.

H.R. Rep. No. 1125, 86th Cong., 1st Sess. 9 (1959); S. Rep. No. 870, 86th Cong., 1st Sess. 9 (1959) (emphasis added).

The judiciary has previously had occasion to consider the role of the Federal Government in regulating nuclear material. In *Northern States Power Co.* v. *Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972), the Eighth Circuit considered whether the Atomic Energy Act pre-empted concurrent state control of matters within the scope of the federal legislation. There, as here, the issue was whether responsibility for regulating discharges of liquid nuclear wastes from nuclear power plants was to be shared by the AEC with another regulatory body. After reviewing the history of the Atomic Energy Act and the consistent Congressional purpose to centralize all regulation of source, by-product and special nuclear material in the AEC, the Court of Appeals held that federal regulation was exclusive and pre-empted state regulation of those substances. The court observed that "[o]nly through the application and enforcement of uniform standards promulgated by a national agency" could the objectives of the Atomic Energy Act, including the protection of public health and safety, be achieved. 447 F.2d at 1154.

In its most recent review of the statutory framework, occurring subsequent to the passage of the FWPCA, Congress apportioned the functions of the AEC between two new closely-related agencies, the Energy Research and Development Administration and the NRC. Energy Reorganization Act of 1974, 88 Stat. 1233, 42 U.S.C.A. §5801 *et seq.* (Supp. Feb., 1975). Not only was NRC given

all the licensing and regulatory functions previously possessed and exercised by the AEC, but Congress intended by this action to "up-grade the regulation of nuclear power." S. Rep. No. 93-980, 93d Cong., 2d Sess. 1 (1974). The establishment of the NRC indicated Congress' continuing recognition of the importance of the AEC's regulatory duties, and also reemphasized Congress' concern that there be efficient regulation of nuclear facilities during the energy crisis.

B. The NRC's regulation of liquid nuclear wastes from nuclear power plants is inextricably intertwined with its regulation of other radiological aspects of such plants.

Pursuant to its congressional mandate, the NRC has regulated liquid nuclear wastes from nuclear power plants since the Atomic Energy Act of 1954 was enacted. In 1957, prior to operation of the first commercial nuclear power plant, the AEC promulgated regulations which established limits upon additions of radioactivity from normal operation of nuclear power plants to the environment. 22 Fed. Reg. 548 (1957). Those regulations, as amended most recently in 1964 (29 Fed. Reg. 14434), provide quantitative limits, measured by concentrations of various radionuclides in air and water in excess of natural background radiation. 10 C.F.R. §20.106 (1974).

The AEC implemented these regulations with specific release limits in licenses, and in practice required concentrations to be maintained well below the limits imposed by the regulations. 36 Fed. Reg. 11113 (1971). In 1970, the AEC supplemented its regulations in 10 C.F.R. Part 20 by adding a new regulation, 10 C.F.R. §50.34a, which required applicants for construction permits and operating licenses for nuclear power plants to

identify the means to be employed to keep levels of radioactivity in liquid and gaseous effluents "as low as practicable." 35 Fed. Reg. 18387 (1970). Shortly thereafter, the AEC proposed an Appendix I to 10 C.F.R. Part 50, which contained numerical guides to meet the "as low as practicable" criterion of §50.34a. 36 Fed. Reg. 11113 (1971). Similar guides were generally employed as "interim guides" in the licensing of nuclear power plants during the evaluation of the regulations.[19] After an extensive rulemaking proceeding, NRC adopted numerical limitations on both gaseous and liquid nuclear wastes from nuclear power plants, effective June 4, 1975. 40 Fed. Reg. 19439 (May 5, 1975). The new limitations require, for example, for liquid nuclear wastes:

> The calculated annual total quantity of all radioactive material above background to be released from each light-water-cooled nuclear power reactor to unrestricted areas will not result in an estimated annual dose or dose commitment from liquid effluents for any individual in an unrestricted area from all pathways of exposure in excess of 3 millirems of the total body or 10 millirems to any organ.

10 C.F.R. Pt. 50, App. I, §II.A, at 40 Fed. Reg. at 19442 (1975). Detailed calculations are necessary to demonstrate that a plant design will be adequate to prevent violation of this regulation. Underlying these calculations are extensive analytical models (some of which utilize computers), which are based on complex engineering assumptions regarding such matters as power plant capacity factors, releases of various radionuclides in liquid effluents and efficiency factors for various types of filters and other clean-up equipment.[20]

[19] *See, e.g.*, Atomic Energy Comm'n, Final Environmental Statement, Proposed Rulemaking Action: Numerical Guides for Design Objectives and Limiting Conditions for Operation to Meet the Criterion "As Low As Practicable" for Radioactive Material in Light-Water-Cooled Nuclear Power Reactor Effluents, WASH-1258 (hereinafter, "WASH-1258"), Vol. 1, at 9-24 (1973).

These discharge limitations are part of a package of regulations. The NRC has also imposed limitations on the radiation exposure for individuals working within the nuclear power plant. 10 C.F.R. §20.101 (1974). Similarly, 10 C.F.R. §100.11 (1974) establishes design basis limits on general population exposure to radiation from all sources, following a "major accident." Finally, in evaluating the environmental effects of the operation of a nuclear power plant pursuant to its responsibilities under the National Environmental Policy Act ("NEPA"), 83 Stat. 852, 42 U.S.C. §§4321 *et seq.* (1970), the NRC evaluates radioactive releases during normal operation and during postulated accident conditions. For example, one of the accidents considered is the "Radwaste System Failure" in which there are assumptions made concerning the failure of storage tanks holding radioactive liquid wastes and its consequent release to the environment.[21] In all of these areas, the regulatory approach has been to concentrate on the effect on public health and safety from all radiation exposures, regardless of the form in which the radiation is released.

[20] A description of such calculations and the engineering assumptions and their bases is found in WASH-1258, Vol. 2.

[21] *See* Nuclear Regulatory Comm'n, Regulatory Guide 4.2, Preparation of Environmental Reports for Nuclear Power Stations, App. 5, at 4.2-74 (Rev. 1, Jan., 1975).

The foregoing regulations are an integral portion of an exceedingly comprehensive set of regulations, regulatory guides, license limitations and technical specifications appended to operating licenses which control all aspects of the design, construction and operation of nuclear power plants. Accordingly, applicants for construction permits and operating licenses are required to present detailed applications which describe in detail the design and operation of the power plant during normal operation and postulated accidents. 10 C.F.R. §50.34 (1974); 10 C.F.R. Pt. 50, App. A (1974). The NRC's primary concern is the protection of the public health and safety from the perils associated with exposure to toxic levels of radioactivity. The NRC's approach to its regulatory responsibilities in this regard has been described as the "defense-in-depth" concept. *Nader* v. *Nuclear Regulatory Comm'n*, 513 F.2d 1045, 1047 n. 7 (D.C. Cir. 1975).

To implement the defense-in-depth concept, regulations establish design criteria for all safety-related equipment. 10 C.F.R. Pt. 50, App. A (1974). Redundancy and multiplicity of safeguards equipment for preventing the release of radioactivity following postulated accidents is required. *E.g.*, 10 C.F.R. Pt. 50, App. A, Criterion 35 (1974); 10 C.F.R. Pt. 50, App. K, §D.1, at 39 Fed. Reg. 1003 (1974). The postulated accidents themselves are based on worst-case assumptions. 10 C.F.R. Pt. 50, App. K, §B.1, at 39 Fed. Reg. 1003 (1974). Further, the NRC requires detailed analyses of each site for a nuclear power plant so that the natural and man-made phenomena which the plant must withstand are fully understood. *E.g.*, *In the Matter of Commonwealth Edison Co.* (*Zion Station, Units 1 and 2*), in Atomic Energy Comm'n, Regulatory

Adjudicatory Issuances 73-10 (hereinafter, "RAI 73-10"), at 887-91 (Nov., 1973). Such matters as the seismology, hydrology and meteorology of each site are carefully explored so that there is assurance that the plant can be safely shut down during the most severe natural phenomena and so that the dispersion of radioactive materials during normal operation and following postulated accidents can be predicted. *See, e.g., In the Matter of Florida Power & Light Co.* (*St. Lucie Nuclear Power Plant Unit No. 2*), in Nuclear Regulatory Comm'n Issuances 75-2, at 101 (Feb., 1975). Quality Assurance Programs, pursuant to which each licensee monitors the quality control of all safety-related features of the design, construction and operation of a nuclear power plant, are an integral part of the defense-in-depth concept. *See* 10 C.F.R. Pt. 50, App. B (1974). Once a plant begins operating, detailed technical specifications to the licenses issued by the Commission control the power plant's operation. RAI 73-10 at 884-87. The NRC has power to impose various sanctions including civil penalties for violations of its regulations and has not hesitated to do so. *See, e.g.*, 39 Fed. Reg. 38017 (1974); New York Times, July 26, 1975, at 27, col. 7; Nucleonics Week, Vol. 15, Dec. 19, 1974, at 8.

Thus, it is plain that control of discharges of liquid nuclear wastes is an integral portion of the NRC's comprehensive regulatory structure for nuclear power plants. As the Eighth Circuit observed in *Northern States*, "regulation of the radioactive effluents discharged from a nuclear power plant is inextricably intertwined with the planning, construction and entire operation of the facility." 447 F.2d at 1153. The Tenth Circuit declined to consider the history of regulation of nuclear power plants

pursuant to the Atomic Energy Act, holding that the inclusion of the words "radioactive materials" in one section of the FWPCA was a self-contained, dispositive expression of Congressional intent to subject discharges of liquid nuclear wastes from nuclear power plants to regulation under that Act. 507 F.2d at 747. As we show in the pages that follow, the regulatory role envisioned by FWPCA for EPA and each state is wholly at odds with comprehensive, unified regulation of nuclear power plants.

III.

Regulation of Liquid Nuclear Wastes Pursuant to the FWPCA Would Not Only Duplicate Existing Federal Regulation, But Would Threaten To Fragment Such Regulation As Well.

A. Implementation of the Tenth Circuit's decision would either preclude state participation in administering the FWPCA or subject the regulation of nuclear power plants to the vagaries of state administration.

The decision of the Tenth Circuit is based on a serious misapprehension of the regulatory scheme established by the FWPCA. The Court of Appeals assumed that its holding will lead to regulation of liquid nuclear wastes by EPA. Thus, the opinion asserts that the "EPA Administrator was generally charged with carrying out the intent behind the 1972 Amendments," 507 F.2d at 747, and that the "EPA Administrator in considering a request to . . . discharge pollutants is subject to the various requirements and limitations provided for in the Act. . . ." *Id.* If the FWPCA simply contemplated regulation by EPA of

liquid nuclear wastes, the resulting duplication of the NRC's regulatory program would be a wasteful and unnecessary burden. However, the actual problem created by the Tenth Circuit's interpretation of the FWPCA is even more severe.

The FWPCA, in its "Declaration of Goals and Policy" explicitly recognizes the primary role of the states in administering that Act:

> It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act . . . .

FWPCA Section 101(b), 86 Stat. 816, 33 U.S.C. §1251(b) (Supp. II, 1972). This policy is given full expression in other provisions of the Act. The essential regulatory structure of the FWPCA applicable to industrial facilities involves the issuance by EPA of "effluent guidelines" under Section 304(b), which provide the basis for "effluent limitations" under Section 301(b), and of new source "performance standards" under Section 306. FWPCA Sections 301(b), 304(b), 306, 86 Stat. 816, 33 U.S.C. §§1311(b), 1314(b), 1316 (Supp. II, 1972). The states may participate in these and other FWPCA requirements in two phases. First, when an industrial facility such as a power plant requires a federal license or permit, the state in which the facility is located may grant or deny "certification" that any discharge from the facility will comply with applicable FWPCA requirements. FWPCA Section 401(a)(1), 86 Stat. 816, 33 U.S.C. §1341(a)(1)(Supp. II, 1972).

Certification, unless waived by the certifying state, is a prerequisite to the issuance of any of the several federal permits or licenses required for the facility. *Id.* Moreover, the certification process is not merely an objective calculation of compliance by a given discharge with these requirements, but provides the opportunity, in effect, for ad hoc rulemaking by the state to assure such compliance. Thus, the certification may specify effluent and other limitations, including design features and operating restrictions which, in the judgment of the state, will be necessary in order to bring the anticipated discharges into compliance with the applicable standards. FWPCA Section 401(d), 86 Stat. 816, 33 U.S.C. §1341(d) (Supp. II, 1972).

The second phase of state participation consists of administering EPA-approved permit programs established under state law. FWPCA Section 402(b), 86 Stat. 816, 33 U.S.C. §1342(b) (Supp. II, 1972). Under this phase, state discretion is substantially enhanced since the states retain their certification functions and assume responsibility for issuance, enforcement and termination of permits under Section 402(b) for discharges of liquid wastes within the state. *Id.* To date, twenty-four states, including four states who participated as *amicus curiae* below, have received such authority under Section 402(b).

While this administrative structure contemplates that the states will maintain much of their traditional powers with respect to pollution sources within their boundaries, no provision of the FWPCA empowers the states to regulate liquid nuclear wastes from nuclear power plants, which has always been an exclusive federal responsibility.

In *Northern States*, which this Court affirmed, the Eighth Circuit held that the Federal government, through the AEC, had "exclusive authority . . . to regulate the construction and operation of nuclear power plants, which necessarily includes regulation of the levels of radioactive effluent discharged from the plant". 447 F.2d at 1154. Thus, any authority the states would otherwise have had under the Tenth Amendment to regulate such radioactive effluents was eliminated by passage of the Atomic Energy Act. Section 510 of the FWPCA, 33 U.S.C. §1370 (Supp. II, 1972), which addresses the authority of the states to regulate pollutants, provides that "nothing in *this Act* shall preclude or deny the right of any State . . . to adopt or enforce . . . any standard or limitation respecting discharges of pollutants . . ." (emphasis added). That provision does not, however, confer authority denied the state under *another* federal statute. Moreover, an attempt was made to amend Section 510 to restore the state's power over nuclear wastes which had been removed by the Atomic Energy Act. That amendment was soundly defeated.[22] The FWPCA does not give the states authority

[22]The debates on this amendment and on the conference report demonstrate that Congress was aware of the *Northern States* decision and did not intend to overrule it in passing the FWPCA. *See* pages 45 and 46, *infra*. Where Congress intended to overrule judicial interpretations of pre-existing statutes it did so expressly, as in the case of Section 511(c) of the FWPCA, 33 U.S.C. §1371(c) (Supp. II, 1972), which explicitly overruled, in part, the decision of the District of Columbia Circuit in *Calvert Cliffs' Coord. Comm., Inc.* v. *Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971). *See* page 37, *infra*. Thus, this situation constitutes a compelling case for application of the principle that "repeals by implication are disfavored." *Administrator, Federal Aviation Admin.* v. *Robertson*, 43 U.S.L.W. 4833, 4837 (June 24, 1975).

to regulate discharges of nuclear wastes from nuclear power plants and, hence, if the FWPCA requires regulation of liquid nuclear wastes, such regulation must be conducted entirely by EPA.

However, the regulatory procedures of the FWPCA do not contemplate that EPA will conduct a permit program with respect to one pollutant and provide for state administration of a permit program for all other pollutants. If the decision of the Tenth Circuit were affirmed, EPA would be faced with an impossible task in developing a regulatory structure which is in accord with both the requirements of the FWPCA and the *Northern States* decision. Thus, the decision of the Tenth Circuit would become the first step in laborious and time consuming litigation construing the provisions of the FWPCA and the Atomic Energy Act. Ultimately, this Court would again be called upon to resolve the resulting problems of federal-state relationships.

To exemplify the dilemmas under the FWPCA which flow from declaring liquid nuclear wastes a "pollutant" which must be regulated by EPA, one need only consider whether EPA can approve any state permit program under Section 402(b) of the FWPCA, 33 U.S.C. §1342(b) (Supp. II, 1972). Under the permit program established by that Section, the state must "submit a statement from the attorney general . . . that the laws of such State . . . provide adequate authority to carry out the described program." Moreover, the Administrator cannot approve the state permit program if he determines that "adequate authority does not exist . . . [t]o issue permits which . . . apply, and insure compliance with any applicable re-

quirements of Sections 301, 302, 306, 307 and 403" of the Act. FWPCA Section 402(b), 86 Stat. 816, 33 U.S.C. §1342(b) (Supp. II, 1972). Thus, on the face of Section 402(b) it would appear that EPA could not approve such programs since, under *Northern States*, no state can have "adequate authority" to regulate liquid nuclear wastes. In other words, the Tenth Circuit's literal interpretation of Section 502(6) of the FWPCA, 33 U.S.C. §1362(6) (Supp. II, 1972), could produce an absurd result since it could render Section 402(b) a nullity. This would frustrate completely the congressional intent that the states assume responsibility for regulating individual discharges within their borders."

It is, of course, conceivable that, faced with the emasculation of Section 402(b) of the FWPCA, EPA or a court would attempt to curtail, without clearly rejecting, the *Northern States* holding of federal pre-emption by deciding that state implementation of EPA's effluent guidelines was permissible.[24] EPA would then proceed to issue effluent guidelines for discharges of liquid nuclear wastes and state participation in the regulatory process would begin.

However, in administering the EPA's effluent guidelines for liquid nuclear wastes, it is likely that the states would tinker with some of the underlying assumptions regarding design, construction and operation of the power

[23]This Court has recognized that a "restricted" interpretation of statutory terms may be adopted "where acceptance of [the literal] meaning would lead to absurd results or would thwart the obvious purpose of the statute." *Helvering* v. *Hammel*, 311 U.S. 504, 510-11 (1940) (citations omitted). EPA's interpretation of Section 502(6) would avoid such results and would assure the congressional intent reflected in Section 402(b) is not thwarted.

[24]*But see* note 22, *supra*.

plant and its fuel. Since evaluation of whether these discharges comply is not necessarily based on past operating experience but is prospective, assumptions regarding performance of fuel, water chemistry, efficiency of clean-up systems and operational modes for the power plant itself are necessary calculational bases. Given the highly sophisticated nature of these assumptions and calculations, it is inevitable that there would be confusion and variation in state certification of compliance under Section 401 of the FWPCA, 33 U.S.C. §1341 (Supp. II, 1972), and permit program administration under Section 402 of the FWPCA, 33 U.S.C. §1342 (Supp. II, 1972).[25] Accordingly, even

[25]Such regulation requires both knowledge of the properties of the discharges themselves and detailed understanding of the interplay of all aspects of the design, construction and operation of the nuclear reactor and its fuel. The nuclear wastes ultimately emitted are derived from the fission of uranium and plutonium atoms in the multitudes of fuel rods in the reactor core and the irradiation of the cooling water and impurities in the cooling water by neutrons released in the fission process. *See* J. Wills, Nuclear Power Plant Technology 196 (1967). These processes result in the formation of a wide variety of radionuclides which have different chemical and physical characteristics such as the rate of decay, the type and energy level of radiation emitted and behavior in plant systems. *See* S. Glasstone, Principles of Nuclear Reactor Engineering 117-20 (1st ed. 1955). WASH-1258, *supra* note 18, Vol. 2, at A-3 through A-13 lists the following as among the principal parameters to be used in calculating the quantities of nuclear wastes which are likely to be discharged from a nuclear power plant: (1) thermal power level; (2) plant capacity factor; (3) fraction of fuel releasing radioactivity to the primary coolant; (4) equilibrium concentrations of various nuclides in primary coolant; (5) various rates of flow, leakage and equipment operation; (6) partition and decontamination factors for radioiodine; (7) decontamination factors for various nuclides and waste streams in demineralizers and evaporators; and (8) hold-up times. Thus, estimating the quantities of radioactivity which may be

though the overall guidelines would be set at the federal level, 50 very different sets of requirements would be possible. Indeed, a state might, under the guise of implementing EPA's effluent guidelines under the FWPCA, attempt to ban nuclear power plants entirely, based on its assumptions regarding fuel performance and plant operation, on the ground that no combination of available equipment provides, in its view, adequate assurance that the FWPCA standards will be met. Moreover, compliance with state interpretations of FWPCA liquid radioactive discharge requirements might force the retention of amounts of radioactive substances within the power plant which would hamper operation in compliance with the NRC's regulations regarding exposures to in-plant employees or increase solid radioactive wastes, raising different considerations of public health and safety which no conceivable construction of the FWPCA would authorize EPA and the states to regulate.

Therefore, state implementation of effluent guidelines for liquid nuclear wastes would completely undermine the goals of the Atomic Energy Act confirmed in *Northern States*. It would prevent unified and comprehensive regulation, would be potentially "overprotective" with respect to one aspect of nuclear power plant operation while

found at any point in a nuclear power plant requires complete understanding of the nuclear fission process, of all of the fluid systems in the nuelear power plant, and of the equipment comprising those systems. Moreover, since the principal means of treating liquid wastes—demineralization in a resin bed, evaporation, or simply drumming the liquid—all yield solid wastes, decreases in liquid nuclear wastes involve increases in quantities of solid wastes which must be shipped to burial sites. *See* Wills, *supra*, at 196-98.

interfering with federal objectives with respect to another, and would in fact constitute "a dual system of licensing and regulation with control exerted by both the states and the federal government," thereby creating "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Northern States Power Co.* v. *Minnesota*, 447 F.2d 1035, 1154 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972).

The effects of the fragmented, uneven regulation resulting from state administration of the FWPCA on the nation's projected need for nuclear power over the next decade would be disastrous. At the very least, the progression of applications for nuclear power plants through the regulatory process would be delayed while the EPA adopts effluent guidelines for liquid nuclear wastes and the administrative mechanism for each state to process applications under the FWPCA is set up. During this interval, scarce fossil fuels would be consumed. Thereafter, further delays would take place while challenges to the derivation of EPA's effluent guidelines were litigated. Moreover, it is possible that public utilities would refrain from committing to new nuclear power plants until the scope and direction of each state's implementation of the FWPCA could be determined. Some public utilities might forego nuclear plants altogether with consequent higher power costs and adverse effects on conservation of fossil fuels. Others might base their choice of the location for such power plants, in part, on the relative stringency of a particular state's interpretation of the EPA's effluent guidelines for liquid radioactive discharges. The interjection of such an artificial factor into power plant siting decisions would hardly be in the public interest.

B. The Court of Appeals erroneously confined its interpretation of the FWPCA to one section of that Act.

As shown above, the Tenth Circuit ignored the effect of its decision on the regulatory structure established by the FWPCA. Instead, the Court fixed its exclusive attention on the definitional section of the FWPCA and held simply that the "plain meaning" of the words "radioactive materials" within the definition of the term "pollutant" compelled the conclusion that Congress intended EPA to regulate liquid nuclear wastes under the FWPCA. 507 F.2d at 747. There is no maxim of statutory construction which required—or permitted—the court below to take such an unduly narrow view of the congressional policy expressed in the FWPCA. This Court has consistently held that in interpreting a statute, it "will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute . . . as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature". *Kokoszka* v. *Belford*, 417 U.S. 642, 650 (1974), *citing Brown* v. *Duchesne*, 60 U.S. (19 How.) 183, 194 (1857).[26]

Moreover, when all of the provisions of the FWPCA are considered, and construed together with the Atomic Energy Act, it is obvious that the inclusion of the words "radioactive materials" in Section 502(6) does not manifest an intent that EPA duplicate NRC's regulation of

[26] *See also Richards* v. *United States*, 369 U.S. 1, 11 (1962): "a section of a statute should not be read in isolation from the context of the whole Act, and . . . in interpreting legislation, '[the Supreme Court] must not be guided by a single sentence or member of a sentence, but [should] look to provisions of the whole law and to its object and policy' " (citations omitted).

liquid nuclear wastes. Section 511(a) of the FWPCA, 33 U.S.C. §1371(a) (Supp. II, 1972), provides, for example, that the FWPCA "shall not be construed as . . . limiting the authority or functions of any officer or agency of the United States under any other law or regulation not inconsistent with this Act. . . ." As we have shown, however, the Tenth Circuit's interpretation of Section 502(6), 33 U.S.C. §1362(6) (Supp. II, 1972), could substantially affect the ability of the NRC to comprehensively regulate source, by-product and special nuclear material.

The Tenth Circuit dealt simplistically with this problem by asserting that the Atomic Energy Act was "inconsistent" with the FWPCA. 507 F.2d at 748. In so holding, the Tenth Circuit ignored the fact that Congress followed a more far-sighted approach in the FWPCA. It dealt with inconsistent statutory provisions by identifying them specifically, not by amending them by implication. Moreover, when Congress chose to affect laws it considered inconsistent with the FWPCA, it did so in a manner that carried out the policy of Section 101(f) of the FWPCA, 33 U.S.C. §1251(f) (Supp. II, 1972), that "needless duplication" be eliminated. Examples are numerous. Section 402(a)(5), 33 U.S.C. §1342(a)(5), eliminates the authority of the Corps of Engineers to issue permits under Section 13 of the Rivers and Harbors Act of 1899, 30 Stat. 1121, 33 U.S.C. §407 (1970). Section 511(a)(2), 33 U.S.C. §1371(a)(2), limits the Corps' water quality responsibilities under Section 10 of the Rivers and Harbors Act of 1899, 30 Stat. 1121, 33 U.S.C. §403 (1970). Section 511(c)(2), 33 U.S.C.

§1371(c)(2), restricts similar responsibilities of federal licensing agencies under the National Environmental Policy Act ("NEPA"), 83 Stat. 852, 42 U.S.C. §§4321 *et seq.* (1970), and specifically limits the authority of the NRC under NEPA to restrict the discharge of cooling water from nuclear power plants.[27] These provisions indicate that, if Congress had considered the Atomic Energy Act and the comprehensive regulatory program of the NRC to be "inconsistent" with the FWPCA, it would have specifically addressed and resolved this inconsistency in the FWPCA.

Other provisious of the Act also indicate that the Tenth Circuit's interpretation was erroneous. For example, the Act includes numerous provisions that call for coordination with other governmental agencies and instrumentalities having an interest in the matters regulated. But the NRC is never mentioned. Section 402(b)(5), (6), 33 U.S.C. §1342(b)(5), (6), requires that the views of the Corps of Engineers and neighboring states be accorded weight in issuing discharge permits. Section 514, 33 U.S.C. §1373, directs that the "permitting agency under section 402 shall assist the applicant for a permit under such section in coordinating the requirements of this Act with those of

[27]When the FWPCA was passed, the AEC was regulating thermal discharges from nuclear power plants pursuant to its NEPA responsibilities. *Calvert Cliffs' Coord. Comm., Inc.* v. *Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971). As described by Senator Muskie in the Senate debates, the FWPCA precluded the AEC from such regulation. Committee Print, A Legislative History of the Water Pollution Control Act Amendments of 1972 Together with a Section-by-Section Index, prepared by the Environmental Policy Division of the Congressional Research Service of the Library of Congress, 93d Cong., 1st Sess. (hereinafter, "Leg. Hist."), Vol. I, at 196-99 (1973). *See also* 10 C.F.R. Pt. 51, at 39 Fed. Reg. 26279 (1974).

the appropriate public health agencies." Section 312(b), 33 U.S.C. §1322(b), directs that EPA consult with the Secretary of Transportation prior to promulgating the "Federal standards of performance for marine sanitation devices." Certainly, these provisions indicate that Congress would have expressly required that EPA coordinate its activities with the NRC, the agency expert in regulating nuclear wastes, if Congress had intended that EPA duplicate the regulatory efforts of the NRC. In view of this statutory pattern, it is not reasonable to conclude that Congress intended to eliminate the exclusive nature of NRC's responsibilities under the Atomic Energy Act and establish overlapping regulation by EPA merely by including the words "radioactive materials" in the definition of "pollutant."

Accordingly, if the Tenth Circuit had considered the FWPCA as a whole and examined the interplay between the FWPCA and the Atomic Energy Act as construed in *Northern States*, the unreasonableness of its conclusion would have been apparent. This Court has looked beyond the four corners of specific legislation in an effort to discern congressional intent and harmonize the legislation before it with that intent. *Morton* v. *Mancari*, 417 U.S. 535 (1974); *see also Boys Market, Inc.* v. *Retail Clerks Union*, 398 U.S. 235 (1970).

In these circumstances, only the most specific congressional intent to superimpose another layer of regulation upon that of the NRC should lead a court to order such an inevitably confusing and wasteful result. The Tenth Circuit discerned that apparent intent from its perusal of one section of the statute itself. As we show in the next section of our brief, had the Tenth Circuit analyzed the legislative history of the FWPCA, it would have concluded that such a Congressional intent is wholly lacking. Indeed, the legislative history of the FWPCA strongly supports the exclusion of liquid nuclear wastes from nuclear power plants from the reach of that statute.

IV.

Congress in Adopting the Federal Water Pollution Control Act Amendments of 1972 Evidenced Its Intent Not to Disturb the Responsibility of the Atomic Energy Commission for Comprehensive Control over all Source, By-product and Special Nuclear Materials.

A. Use of legislative history as an aid to statutory construction is appropriate under these circumstances.

The Tenth Circuit predicated its refusal to consider the legislative history of the applicable provisions of the FWPCA on its version of the "plain meaning" rule of statutory construction—where the language of a statute is clear, there is "no need" to resort to the legislative history as an aid to its interpretation. 507 F.2d at 746. In view of the statutory definition of source, by-product and special nuclear material in the Atomic Energy Act and existing regulation of those substances in liquid discharges from nuclear power plants by the AEC, the cryptic inclusion of the words "radioactive materials" in the definition of "pollutant" in the FWPCA can hardly be regarded as a clear expression of Congressional intent. As noted by this Court in *Chemehuevi Tribe of Indians* v. *Federal Power Comm'n*, 95 S. Ct. 1066, 1072 (1975), careful analysis of a statutory phrase may disclose an "ambiguity latent in the seemingly clear language chosen by Congress to define the extent of the Commission's licensing authority."

The "plain meaning" rule is not, and has never been, an exclusionary rule of law which would prevent courts from considering legislative history as an aid to statutory interpretation. As stated by Justice Holmes, this so-called rule is "rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists." *Boston Sand & Gravel Co.* v. *United States*, 278 U.S. 41, 48 (1928).

The Tenth Circuit failed to consider the circumstances in which legislative history may properly be used in the judicial construction of a statute. First, the legislative history may clarify imprecise statutory terms. *United States* v. *American Trucking Assn's, Inc.*, 310 U.S. 534 (1940); *see also, Chemehuevi Tribe of Indians* v. *Federal Power Comm'n*, 95 S. Ct. 1066 (1975). Second, legislative history may reveal a particular Congressional purpose not manifest on the surface of the statute. *E.g., Cass* v. *United States*, 417 U.S. 72 (1974); *Harrison* v. *Northern Trust Co.*, 317 U.S. 476 (1943). Third, this Court has found it appropriate to resort to legislative history for direction in avoiding results otherwise to be drawn from acts of Congress which would be "extraordinary" or "unreasonable."

> When [the plain meaning of words in a statute] has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one "plainly at variance with the policy of the legislation as a whole" this Court has followed tnat purpose, rather than the literal words.

United States v. *American Trucking Ass'ns, Inc.*, 310 U.S. 534, 543 (1940) (citations omitted); *see also National Labor Relations Board* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 184 (1967); *Perry* v. *Commerce Loan Co.*, 383 U.S. 392 (1966).

The inclusion of the words "radioactive materials" in the FWPCA cannot be deemed a conclusive expression of congressional will to authorize EPA to regulate liquid radioactive discharges from nuclear power plants in view of the comprehensive regulation of such discharges by the AEC. Section 101(f) of the FWPCA, 33 U.S.C. §1251(f) (Supp. II, 1972), itself specifically declares that the policy of the statute is to prevent "needless duplication and unnecessary delays at all levels of government." It is apparent that each of the factors which justify resort to the legislative history is present in this instance.

The rulings of this Court on which the court below relied to hold that there was "no need" for consideration of legislative history do not prohibit such consideration, but rather explain how the interpretive process is to be performed. As quoted by the Tenth Circuit, 507 F.2d at 747, "the plain words and meaning of a statute cannot be overcome by a legislative history which, through *strained processes of deduction* from events of *wholly ambiguous significance*, may furnish *dubious bases of inference* in every direction." *Gemsco, Inc.* v. *Walling*, 324 U.S. 244, 260 (1945) (emphasis added). That is certainly a valid formulation, but it is simply not relevant to the facts of this case. The legislative history of the FWPCA strongly reflects the consensus of Congress with respect to the intended scope of the term "radioactive materials" as used in the definition of "pollutant". Moreover, since the Congressional purpose is buttressed by the interpretation

already given the language of the statute by the agency charged with its administration, it is particularly important that the courts, in interpreting the Act, not be caught up in "a literal interpretation dogma." *United States* v. *American Trucking Ass'ns, Inc.*, 310 U.S. 534, 544, 549 (1940).

B. Congress clearly intended to except by-product, source, and special nuclear materials already extensively regulated by the NRC from the definition of "pollutant" contained in the FWPCA.

To dismiss the legislative history of the FWPCA as "conflicting and inconclusive," as the Tenth Circuit did, 507 F.2d at 748, is neither a fair comment on Congress' efforts to provide a legislative history that would aid administrative and judicial interpretations of the statute generally, nor does it reflect a careful analysis of the specific legislative history of the statutory phrase at issue here. The House and Senate both held extensive hearings on these Amendments, such hearings beginning early in 1971.[28] Nowhere in the voluminous hearings is there tes-

[28]A partial list of the Hearings is as follows: Hearings on Water Pollution Control Legislation Before the Subcomm. on Air and Water Pollution of the Sen. Comm. on Public Works, 92d Cong., 1st Sess., pts. 1–9 (1971); Hearings on Water Pollution Control Programs Before the Subcomm. on Air and Water Pollution of the Sen. Comm. on Public Works, 92d Cong., 1st Sess. (1971); Hearings on Water Pollution Control Legislation—1971, Before the House Comm. on Public Works, 92d Cong., 1st Sess. (1971); Hearings on Water Pollution Control Legislation—1971, H.R. 11896, H.R. 11895, Before the House Comm. on Public Works, 92d Cong., 1st Sess. (1971); Hearings on Water Pollution Control Legislation—1971 (Proposed Amendments to Existing Legislation) Before the House Comm. on Public Works, 92d Cong., 1st Sess. (1971).

timony regarding the need for EPA regulation of liquid nuclear wastes from nuclear power plants. Indeed, the Petitioner in this case, Russell Train, then head of the Council on Environmental Quality, testified that existing AEC regulation of such discharges from nuclear power plants was rigorous and demanded adherence to "the highest possible standards." 2 Leg. Hist. 1177.

The sponsors of the respective bills which became the FWPCA expressed their understanding that passage of the legislation would not affect the relationship of the Federal Government and the states with respect to regulation of nuclear wastes, and their intention that the FWPCA would neither restrict nor duplicate any of the authority of the AEC over such discharges under the Atomic Energy Act. On the Senate side, this was done by affirming that the FWPCA would not "in any way affect" the AEC's authority over radioactive materials under the Atomic Energy Act.[29] The House sponsors further ex-

[29]Mr. PASTORE . . . I also note that the definition of 'pollutant' contained in section 502(f) of the bill, on page 164, includes the words 'radioactive materials.'

My question is this: Does this measure that has been reported by the committee in any way affect the existing law, that is, the existing Atomic Energy Act of 1954, insofar as the regulatory powers of the AEC are concerned with reference to radioactive material?

MR. MUSKIE. It does not; and it is not the intent of this act to affect the 1954 legislation.

MR. PASTORE. In other words, this bill does not change that feature of the Atomic Energy Act in any regard?

MR. MUSKIE. That is correct.

2 Leg. Hist. 1265–66. This exchange between Senators Muskie and Pastore is particularly significant because Senator Pastore was Vice-Chairman of the Joint Committee on Atomic Energy and Senator Muskie was the principal sponsor of the bill in the Senate.

plained the intent by declaring that "radioactive materials" as used in the definition of "pollutant" would exclude source, by-product and special nuclear materials as regulated by the AEC. 1 Leg. Hist. 588-89, 818 (Public Works Comm. Report and debate). As reported by the House managers, the Conference Committee agreed with the House interpretation of the meaning of the term "radioactive materials". 1 Leg. Hist. 226-27.

The Senate bill, S. 2770, was considered and passed while the House Committee on Public Works was still holding hearings on its version of the 1972 Amendments. S. 2770 defined "pollutant" in Section 502(f) as follows:

> The term 'pollutant' means, but is not limited to, dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat. . . .

Although the Senate Committee did not explain the meaning of "radioactive materials" within the definition of "pollutant", the House Report on H.R. 11896, which contained essentially the same definition of "pollutant", carefully defined the words "radioactive materials."

> The term "pollutant" as defined in the bill includes radioactive materials. *These materials are those not encompassed in the definition of source, by-product, or special nuclear materials as defined by the Atomic Energy Act of 1954, as amended, and regulated pursuant to that Act.* 'Radioactive materials' encompassed by this bill are those beyond the jurisdiction of the Atomic Energy Commission. Examples of radioactive material not covered by the Atomic Energy Act, and therefore, included within the term 'pollutant' are radium and accelerator produced isotopes.

1 Leg. Hist. 818 (emphasis added).

Congressman Holifield, Chairman of the Joint Committee on Atomic Energy, requested further assurance as to the meaning of the passage quoted above during the House debate on H.R. 11896. He asked as follows:

> Is that a true and clear definition of the intent of the Committee in the utilization of the words "radioactive materials"?
>
> Mr. JONES of Alabama. The gentleman is correct. That was the intent. The gentleman has just read from page 131 of the report, and that is our specific intention, as I understand.
>
> * * *
>
> Mr. HARSHA: I will respond in the affirmative to that question. That is definitely what we mean. As I said earlier in the debate on the Wolff amendment, we intended to leave the jurisdiction of radioactive material that came within the Atomic Energy Act up to the Atomic Energy Commission. The language applies only to everything outside the jurisdiction of AEC. That is definitely the intent of the wording of the bill and the intent of the committee.

1 Leg. Hist. 588.[30]

Significantly, the House rejected the only attempt to extend the FWPCA to control of liquid nuclear wastes. The Wolff Amendment was intended to amend Section 510 of the House bill to give the states the right "with respect to radioactive materials and thermal discharges, to adopt or enforce any standard or limitation respecting the release of radioactive materials and thermal discharges into water" which was at least as stringent as the federal standards or limitations. 1 Leg. Hist. 542. The purpose of this amendment was to overrule the

[30]Congressmen Jones and Harsha were among the managers of the bill.

District Court and Court of Appeals decisions in the *Northern States* case.

Congressman Wolff recognized that H.R. 11896 without his proposed amendment did not disturb the AEC's exclusive jurisdiction over source, by-product, and special nuclear materials. He stated that:

> It does seem strange to me, though, that the bill fails to prohibit the routine discharge of radioactive wastes from nuclear powerplants into the water. Our amendment will give the States a voice in deciding what kinds and amounts of such radioactive wastes may be discharged into their waters.

1 Leg. Hist. 544.

Congressman McCormack spoke in opposition to the Wolff amendment:

> I would like to conclude by saying that it is obvious from the report by the House Committee on Public Works for this bill and from the committee report from the other body that this bill does not impact directly upon the Atomic Energy Act of 1954. This bill applies only to radioactive materials not covered by the Atomic Energy Act of 1954 and as such the amendment is not relevant to this bill at all.

1 Leg. Hist. 551.

The amendment was defeated, 106 to 36. 1 Leg. Hist. 557.

The Conference version of the 1972 Amendments included the phrase "radioactive materials" in the definition of "pollutant". 1 Leg. Hist. 326–27. Undoubtedly because the House and Senate bills were not different in respect to the basic definition of pollutant as including "radioactive materials", the Conference report, which discusses

the resolution of differences in the two bills, adds nothing further to the legislative history of this section. The House debate on the Conference bill, however, contains an exchange of views which adds further support to the position that "radioactive materials" does not include source, by-product, and special nuclear materials regulated by the AEC.

Congressman Anderson of Illinois, a member of the Joint Committee on Atomic Energy, discussed the definition of "pollutant":

> Mr. Speaker, I note that pollutant is defined in Section 502(6) so as to include radioactive materials. This [was] also true of both S.2270 as passed by the Senate and the House so there has been no change in this respect. S.2770 as passed by the Senate did not amend the Atomic Energy Act as interpreted in Northern States Power against Minnesota and as affirmed by the Supreme Court with respect to state authority over nuclear materials and facilities ... the Conferree's statement does not indicate that any change in this matter is intended—indeed Section 101(f), declaring a national policy to prevent needless duplication and unnecessary delays at all levels of government, reinforces the earlier House and Senate actions on this matter. Nevertheless I should like to confirm my understanding that the Bill as reported by the conferrees is not intended to change the careful division of authority between the States and the Federal Government over nuclear materials and facilities under the Atomic Energy Act. ...

1 Leg. Hist. 226.

Congressman Harsha, the ranking Republican member of the Committee on Public Works, and one of the managers of the bill, responded as follows:

The gentleman is quite correct.

* * *

I can say to the gentleman from Illinois that the managers in no way detracted from the intent of the language in H.R. 11896. I also note that the Committee on Public Works in its report on H.R. 11896 stated on page 131 that the term "pollutant" as defined in the bill includes "radioactive materials." These materials are not those encompassed in the definition of source, byproduct, or special nuclear materials as defined by the Atomic Energy Act of 1954, as amended, and regulated pursuant to that act. "Radioactive materials" encompassed by this bill are those beyond the jurisdiction of the Atomic Energy Commission. . . . This language adequately reflects the intent of the managers of the conference report.

1 Leg. Hist. 226-27. Congressman Jones of Alabama, the Chairman of the Subcommittee and a member of the Conference Committee, was asked by Mr. Anderson whether his understanding on these matters was the same. Referring to Mr. Harsha's comments, he stated, "I am totally in agreement with his explanation and his understanding of what is intended in this conference report." 1 Leg. Hist. 229.

The Conference bill subsequently became the FWPCA, thus extending into law the consensus of the Congress that "radioactive materials" already regulated by the AEC were to be excluded from EPA's mandate. To find, as the court below has done, that the legislative history of FWPCA should be labeled "conflicting and inconclusive" — and be ignored, in any event—is simply incorrect.

V.

EPA's Interpretation of FWPCA Should Be Given Great Weight by This Court.

In the determination which underlies this case, EPA recognized that it is without statutory jurisdiction to regulate discharges of source, by-product and special nuclear materials.[31] This determination merits great weight by the courts since "it involves a contemporaneous construction of the Act by the officials charged with the responsibility of setting its machinery in motion." *Chemeheuvi Tribe of Indians* v. *Federal Power Comm'n*, 95 S.Ct. 1066, 1075 (1975). As in *Chemeheuvi*, particular weight must be given since the implementing agency recognized the appropriateness of a limitation on its powers, rather than attempting to extend those powers.

The necessity of giving weight to the EPA determinations is particularly apparent in view of the broad and

---

[31]In its regulations establishing the permit program under Section 402 of the FWPCA, 33 U.S.C. §1342 (Supp. II, 1972), EPA made the following determination:

> COMMENT.—The legislative history of the [FWPCA] reflects that the term 'radioactive' materials' as included within the definition of 'pollutant' in section 502 of the Act covers only radiactive materials which are not encompassed in the definition of source, by-product, or special nuclear materials as defined by the Atomic Energy Act of 1954, as amended, and regulated pursuant to the latter Act. Examples of radioactive materials not covered by the Atomic Energy Act and, therefore, included within the term 'pollutant' are radium and accelerator produced isotopes. (H.R.Rep. 92-911, 92d Cong.2d Sess., 131, March 11, 1972; 117 Cong.Rec. 17401, daily ed., November 2, 1971; 118 Cong.Rec. 9115, daily ed., October 4, 1972.)

40 C.F.R. §125.1(y) (1974).

complex matters which are the subject of its mandate and of the opportunities that mandate entails for frequent collisions with the tasks of other agencies. Thus, in approving an EPA interpretation under the Clean Air Act, 77 Stat. 392, as amended, 42 U.S.C. §§1857 *et seq.* (1970), this court has recently stated in *Train* v. *Natural Resources Defense Council, Inc.*, 95 S. Ct. 1470, 1485 (1975):

> We therefore conclude that the Agency's interpretation . . . was "correct," to the extent that it can be said with complete assurance that any particular interpretation of a complex statute such as this is the "correct" one. Given this conclusion, as well as the facts that the Agency is charged with administration of the Act, and that there has undoubtedly been reliance upon its interpretation by the States and other parties affected by the Act, we have no doubt whatever that its construction was sufficiently reasonable to preclude the Court of Appeals from substituting its judgment for that of the Agency.

While the EPA's administrative interpretations of the FWPCA have not been extensively reviewed in court to date, the holdings under the Act have generally reflected deference to the EPA in interpreting its mandate. *E.g.*, *Natural Resources Defense Council, Inc.* v. *Train*, 510 F.2d 692, 706 (D.C. Cir. 1974).

The correctness of EPA's disclaimer of jurisdiction over liquid nuclear wastes pursuant to the FWPCA is further demonstrated by the fact that, although Congress has reviewed both the FWPCA and the Atomic Energy Act on several occasions since 1972, it has never expressed disagreement with EPA's interpretation of its lack of authority over such discharge. Thus, in oversight hearings conducted on the administration of the FWPCA,

notably including hearings of June 26, 1974, which focused directly on the steam electric power generating category, no question or challenge was raised with respect to EPA's interpretation of the definition of "pollutant" in the FWPCA. Hearings on the Implementation of the Federal Water Pollution Control Act Before the Subcomm. on Investigations and Review of the House Comm. on Public Works, 93d Cong., 2d Sess. (1974). Also in 1974, Congress considered the regulatory responsibilities of the AEC. The Energy Reorganization Act of 1974, 88 Stat. 1233, 42 U.S.C.A. §§5801 *et seq.* (Supp. Feb., 1975), apportioned the functions of the AEC between two agencies, NRC and the Energy Research and Development Administration. One of the express purposes of the legislation was to "upgrade the regulation of nuclear power" S. Rep. No. 93-980, 93d Cong., 2d Sess. 1 (1974). It was anticipated that the NRC would succeed to "all the licensing and related regulatory functions of the AEC." *Id.* at 57. No mention was made by Congress of any concurrent regulatory jurisdiction over liquid nuclear wastes by EPA, even though the FWPCA had been in force for nearly two years and EPA was in the process of issuing effluent guidelines for power plants which did not deal with source, by-product and special nuclear materials in accordance with its interpretation of its jurisdiction under the FWPCA. 39 Fed. Reg. 8293 (1974); *see* 39 Fed. Reg. 36185 (1974).

The Tenth Circuit rendered lip service to its own version of the rule that the construction given a statute by the agency entrusted with its administration is "to be given weight," but then declined to accord any authoritative weight to EPA's interpretation of the FWPCA due

to the Court's asserted fear of "thwarting the will of Congress." 507 F. 2d at 748. This falls far short of the "great weight" consistently accorded by this Court to administrative interpretations of regulatory mandates:

> The [two Federal agencies with regulatory authority over employees in the affected industry] have both interpreted §204(a) as relating solely to safety of operation. In any case such interpretations are entitled to great weight. This is peculiarly true here where the interpretations involve "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new."

United States v. *American Trucking Ass'ns, Inc.*, 310 U.S. 534, 549 (1940) (citations omitted); *accord, Zuber* v. *Allen*, 396 U.S. 168 (1969); *Udall* v. *Tallman*, 380 U.S. 1, 16–18 (1965).

Furthermore, EPA's disclaimer of jurisdiction over discharges of source, by-product and special nuclear materials does not stand alone. The AEC entered into a Memorandum of Understanding with EPA in which AEC agreed to "take appropriate action to assure that AEC-licensed facilities are operated in such a manner that routine radioactive discharges therefrom do not exceed generally applicable environmental standards established by EPA. . . ." AEC-EPA Memorandum of Understanding with Respect to AEC-Licensed Facilities, 38 Fed. Reg. 24936 (Sept. 11, 1973); *see also* Memorandum of Understanding With Respect to AEC Facilities, 38 Fed. Reg. 32965 (Nov. 29, 1973). The NRC has followed the AEC action in this respect. 40 Fed. Reg. 19439, n. 3 (1975).

These agreements are in accord with the delineation of the respective roles of the EPA and the AEC which occurred when EPA was established. Reorganization Plan No. 3 of 1970, 84 Stat. 2086, 42 U.S.C. §4321 (1970), which established the EPA, transferred to it the duties of the Federal Radiation Council,[32] and the duties of the AEC's Division of Radiation Protection Standards, to the extent that the Division's functions—

> consist of establishing generally applicable environmental standards for the protection of the general environment from radioactive material. As used herein, standards mean limits on radiation exposures or levels, or concentrations or quantities of radioactive material, in the general environment outside the boundaries of locations under the control of persons possessing or using radioactive material.

Pursuant to this delineation of its authority, EPA has for several years been considering the adequacy of existing radiation standards and has recently proposed further environmental standards. On May 29, 1975, EPA proposed "Environmental Radiation Protection Standards for Nuclear Power Operation" pursuant to its authority under the Atomic Energy Act and Reorganization Plan. No. 3 of 1970. 40 Fed. Reg. 23419 (1975). These proposed standards would apply to "radiation doses received by members of the public in the general environment . . . as the result of operations which are part of a nuclear fuel cycle."

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[32]The Council has the statutory purpose to "advise the President with respect to radiation matters, directly or indirectly affecting health, including guidance for all Federal agencies in the formulation of radiation standards." Atomic Energy Act of 1954, as amended, Section 274(h), 73 Stat. 688, 42 U.S.C. §2021(h) (1970).

Id., §190.01 at 23424. The standards, to be enforced by the NRC through its licenses, permits, and other requirements applying to individual facilities, supplement existing EPA environmental standards with respect to permissible exposure by imposing lower limits where practicable and by imposing specific limits to control environmental buildups of plutonium, tritium and krypton.

In this context, the unique importance of the EPA determination that liquid nuclear wastes are not subject to the FWPCA becomes manifest. Taken together with the NRC's recognition of EPA's general standard-setting authority, the EPA determination creates a workable relationship between two agencies which implements the delineation contemplated in their origins, prevents duplication of effort and allows each an effective role. Thus, by disclaiming jurisdiction over discharges of source, by-product and special nuclear materials, EPA did not abandon a role with respect to environmental levels of radiation. EPA simply recognized, as Congress intended, that NRC can best implement EPA's general environmental standards as part of its coherent regulatory structure and that no public benefit could possibly be derived from EPA's intervention with respect to liquid nuclear wastes.

CONCLUSION

For the foregoing reasons, the opinion and order of the Tenth Circuit should be reversed.

Respectfully submitted,

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APPENDIX A

Utility	Customers in Service Territory[1]	Current % of Generating Capacity Which Utilizes Nuclear Energy	% of Generating Capacity Which Will Utilize Nuclear Energy in 1985
Boston Edison Company.....	594,000	22	38
Carolina Power & Light Company.....	648,000	11.8	50
Commonwealth Edison Company.....	2,729,000	33	43

Number and Capacity of Nuclear Plants With Operating Licenses[1]		Number, Capacity and Anticipated Service Date of Nuclear Plants Which Have Construction Permits or Are the Subject of Construction Permit Applications[1]		
Plant	Kilowatts Electrical (in thousands)	Plant	Kilowatts Electrical (in thousands)	Date
Pilgrim 1	670	Pilgrim 2	1180	1982
Yankee Rowe	175			
Connecticut Yankee	575			
H. B. Robinson 2	665	Brunswick 1	821	1976
Brunswick 2	821	Harris 1	900	1981
		Harris 2	900	1982
		Harris 3	900	1983
		Harris 4	900	1984
Dresden 1	200	LaSalle 1	1078	1978
Dresden 2	800	LaSalle 2	1078	1979
Dresden 3	800	Byron 1	1120	1980
Quad Cities 1	800	Byron 2	1120	1981
Quad Cities 2	800	Braidwood 1	1120	1982
Zion 1	1040	Braidwood 2	1120	1982
Zion 2	1040			

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Now comes Michael S. Baram, Dr. Eric Petraske, and the Environmental Law Society of Boston University School of Law, on behalf of themselves, and respectfully move this Court, pursuant to Rule 42.3 of the Rules of this Court, for leave to file the accompanying brief in this case amicus curiae, in order to maintain their interests in environmental health, and for the reasons set forth below.

Messrs. Baram, Petraske and the Environmental Law Society have substantial interests in this case:

(1) their health and welfare, which will suffer increased risk of adverse health effects from low-level ionizing radiation emissions in the effluent discharge from nuclear power plants, unless such discharges are regulated in the manner as determined by Congress to be necessary to protect environmental health by the appropriate environmental agency;

(2) the primary objective of said applicants for amicus curiae status to achieve and maintain environmental quality at levels necessary to ensure the health of present and future generations;

(3) their expertise on radiation rule-making, which can help the Court to a fuller understanding of the complex issues underlying this case.

This petition is presented to the Court to ensure that the Court will give full consideration to the environmental health consequences of rule making on radioactive effluents from nuclear power plants by the Environmental Protection Agency and the Nuclear Regulatory Commission, as such consequences have been considered and acted on by

Utility	Customers in Service Territory[1]	Current % of Generating Capacity Which Utilizes Nuclear Energy	% of Generating Capacity Which Will Utilize Nuclear Energy in 1985
Consolidated Edison Company of New York, Inc.	2,800,000	10.8	19.3[3]
The Detroit Edison Company.	1,651,402	0	26.5
Illinois Power Company.....	471,490	0	37
Louisiana Power & Light Company.....	399,342	0	21
Niagara-Mohawk Power Corporation.....	1,278,000	9	18
Northern States Power Company.....	948,192	31.2	28.4

Number and Capacity of Nuclear Plants With Operating Licenses[2]		Number, Capacity and Anticipated Service Date of Nuclear Plants Which Have Construction Permits or Are the Subject of Construction Permit Applications[2]		
Plant	Kilowatts Electrical (in thousands)	Plant	Kilowatts Electrical (in thousands)	Date
Indian Point 1	257	Indian Point 3	873	1976
Indian Point 2	864			
—		Fermi 2	1150	1980–1981
		Greenwood 2	1207	1984
		Greenwood 3	1207	1986
—		Clinton 1	950	1981
		Clinton 2	950	1983
—		Waterford 3	1165	1981
Nine Mile Point 1	610	Nine Mile Point 2	1100	1982
Monticello 1	538	Tyrone 1	1150	1985
Prairie Island 1	520			
Prairie Island 2	520			

Congress in providing authority to these agencies. Further, this petition is presented to the Court to ensure that the relationship between general environmental levels and discharge levels for radioactive materials is ascertained and used in the determination of limits on radioactive effluents from nuclear power plants, for the protection of environmental health.

On the basis of our expertise in the technical, analytical and legal aspects of regulating radioactive effluent discharges from nuclear power plants, we have reached conclusions on the merits of this case, and offer our assistance to the Court.

Michael S. Baram, attorney for the Environmental Law Society, is an Associate Professor at the Massachusetts Institute of Technology. He is Vice Chairman of the American Bar Association's Committee on Environmental Law (General Practice Section), Chairman of the American Bar Association's Committee on Technology Assessment, is a member of two committees of the National Academy of Sciences (including the Committee on Biological Effects of Ionizing Radiation), and special advisor to a Committee of the National Academy of Engineering. He is a Lecturer in Law at Boston University School of Law, and counsel to the law firm of Bracken and Selig.

The Environmental Law Society of Boston University School of Law is a student association with expertise in environmental control and energy programs. Dr. Eric Petraske, a member of the Society, holds a doctorate in nuclear physics, has held post-doctoral and faculty appointments in this field, and is now a third-year law student at Boston University School of Law. He has worked closely with Professor Baram on various studies relating to nuclear power regulation.

Messrs. Baram and Petraske have been extensively

Utility	Customers in Service Territory[1]	Current % of Generating Capacity Which Utilizes Nuclear Energy	% of Generating Capacity Which Will Utilize Nuclear Energy in 1985
Omaha Public Power District.	192,766	32.2	51.5
Power Authority of the State of New York.....	50[4]	16	31[3]
Rochester Gas & Electric Corporation.....	272,195	47	54
Southern California Edison Company.....	2,700,000	3	12
Union Electric Company.....	905,000	0	21
Wisconsin Electric Power Company.....	731,834	27	33.3

Number and Capacity of Nuclear Plants With Operating Licenses[2]		Number, Capacity and Anticipated Service Date of Nuclear Plants Which Have Construction Permits or Are the Subject of Construction Permit Applications[2]		
Plant	Kilowatts Electrical (in thousands)	Plant	Kilowatts Electrical (in thousands)	Date
Ft. Calhoun 1	455	Ft. Calhoun 2	1150	1983
Fitzpatrick	821	Greene County	1300	1982–1983
Ginna 1	470	Sterling	1150	1982
San Onofre 1	430	San Onofre 2	1100	1980
		San Onofre 3	1100	1981
—		Callaway 1	1150	1981
		Callaway 2	1150	1983
Pt. Beach 1	485	Koshkonong 1	900	1983
Pt. Beach 2	485	Koshkonong 2	900	1984

involved in research on standard-setting and other aspects of regulating ionizing radiation from nuclear power sources. They have developed expertise on the several regulatory approaches employed to control ionizing radiation; on the authority of the Nuclear Regulatory Commission, the Environmental Protection Agency, and the States; and on the analytical methods employed by regulatory authorities for standard-setting and other decision-making.

For the above reasons, and on the basis of the expertise indicated, we petition this Court to enable Messrs. Baram and Petraske, and the Environmental Law Society of Boston University School of Law to contribute significantly to the resolution of the issue of Congressional intent in this case, and thereby request permission to file our brief amicus curiae.

Respectfully submitted,

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September 22, 1975

* Motion for admission to practice before the Supreme Court of the United States granted on September 19, 1975.

Utility	Customers in Service Territory[1]	Current % of Generating Capacity Which Utilizes Nuclear Energy	% of Generating Capacity Which Will Utilize Nuclear Energy in 1985
The New England area:[5]			
Central Maine Power Company	340,000	31	39
The Connecticut Light and Power Company	536,000	21	40
The Hartford Electric Light Company	282,000	21	40
Maine Yankee Atomic Power Company			
New England Power Company	44[4]	8.7	37
Northeast Nuclear Energy Company			
Public Service Company of New Hampshire	250,000	9.2	57.2
Vermont Yankee Nuclear Power Corporation			
Western Massachusetts Electric Company	161,000	21	40
Yankee Atomic Electric Company			

Number and Capacity of Nuclear Plants With Operating Licenses[2]		Number, Capacity and Anticipated Service Date of Nuclear Plants Which Have Construction Permits or Are the Subject of Construction Permit Applications[3]		
Plant	Kilowatts Electrical (in thousands)	Plant	Kilowatts Electrical (in thousands)	Date
Yankee Rowe	175	Millstone 2	830	1975
Vermont Yankee	540	Millstone 3	1,150	1979
Connecticut Yankee	575	Montague 1	1,150	1986
Millstone 1	660	Montague 2	1,150	1988
Maine Yankee	855	Pilgrim 2	1,180	1982
		Seabrooke 1	1,150	1980
		Seabrooke 2	1,150	1982

Footnotes to Appendix A

[1]The population served by each utility is a considerably larger number. For example, the population in the service territory of Commonwealth Edison Company is approximately 8,000,000.

[2]Some of the nuclear plants listed are partially owned by other companies.

[3]This number includes Indian Point 3.

[4]These companies are wholesalers of power.

[5]The Northeast Nuclear Energy Company, Maine Yankee Atomic Power Company, Vermont Yankee Nuclear Power Corporation and Yankee Atomic Electric Company are generating companies which construct and operate nuclear power plants for some of the other utilities listed in this group. One or more of the companies in this group has an interest in each of the plants listed.

MOTION FILED

SEP 24 1975

No. 74-1270

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

Russell Train, Administrator of the Environmental Protection Agency, et. al., Petitioners

v.

Colorado Public Interest Research Group, Inc., et. al., Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF AMICUS CURIAE OF PROFESSOR MICHAEL S. BARAM, DR. ERIC PETRASKE, AND THE BOSTON UNIVERSITY ENVIRONMENTAL LAW SOCIETY.

No. 74-1270

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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I. AUTHORITY TO SET STANDARDS FOR THE CONCENTRATION OF RADIOACTIVE MATERIALS IN THE GENERAL ENVIRONMENT WAS TRANSFERRED FROM THE AEC TO THE EPA IN 1970, AND THIS TRANSFER PROVIDES EPA WITH THE AUTHORITY TO DETERMINE EFFLUENT DISCHARGE LIMITATIONS FOR THE SOURCES OF RADIOACTIVE MATERIALS IN THE GENERAL ENVIRONMENT, WHICH SOURCES INCLUDE NRC LICENSEES 10

II. EPA AUTHORITY TO DETERMINE EFFLUENT DISCHARGE LIMITATIONS FOR THE SOURCES OF RADIOACTIVE MATERIALS IN THE GENERAL ENVIRONMENT, INCLUDING NRC LICENSEES, IS CONSISTENT WITH THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, AND WITH THE FEDERAL PREEMPTION OF STATE REGULATION OF RADIOACTIVE EFFLUENT DISCHARGES FROM NUCLEAR POWER FACILITIES 18

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40 Fed. Reg. 23420 13,24

INTEREST OF THE AMICUS

This brief amicus is presented on behalf of Michael S. Baram, Eric W. Petraske, and the Environmental Law Society of Boston University School of Law, who have substantial personal interests in environmental health and the protection of the environment.

Michael S. Baram, attorney for the Environmental Law Society, is an Associate Professor at the Massachusetts Institute of Technology. He is Vice Chairman of the American Bar Association's Committee on Environmental Law (General Practice Section), Chairman of the American Bar Association's Committee on Technology Assessment, member of two committees of the National Academy of Sciences (including the Committee on Biological Effects of Ionizing Radiation), and special advisor to a Committee of the National Academy of Engineering. He is a Lecturer in Law at Boston University School of Law, and counsel

to the law firm of Bracken and Selig.

The Environmental Law Society of Boston University School of Law is an organization of students with expertise in environmental regulation and energy programs. Dr. Eric Petraske, a member, holds a doctorate in nuclear physics, has held post-doctoral and faculty appointments in this field, and is now a third-year law student at Boston University School of Law. He has worked closely with Professor Baram on various studies relating to nuclear power.

Messrs. Baram and Petraske have conducted substantial research on standard-setting and other aspects of regulating ionizing radiation from nuclear power sources. They have developed expertise on the several regulatory approaches employed to control ionizing radiation; on the authority of the Nuclear Regulatory Commission (NRC), the Environmental Protection Agency (EPA),

and the States; and on the analytical methods employed by these authorities for standard-setting and other decision-making.

This expert knowledge has enabled them and the Boston University Environmental Law Society to become aware of serious deficiencies in the discussion of this case as it has progressed through the lower courts. Therefore, this brief has a single purpose: to focus on these specific defects and to bring necessary analysis to the attention of the Court. The results of this analysis support the Respondent's position in this case.

At stake in this case are: (1) important public interests in environmental health and the quality of ecosystems, for present and future generations; (2) the allocation of regulatory authority suitable to the nature of the radiation control problem and in harmony with the

legislative framework provided by Congress; and (3) development of appropriate government regulations for the optimal use of nuclear power.

SUMMARY OF ARGUMENT

Petitioners argue that the combination of legislative history and existing regulation of radioactive effluent discharges from nuclear power plants is sufficient to sustain the present regulatory practices of the Nuclear Regulatory Commission (NRC) and the Environmental Protection Agency (EPA). Present regulatory practices have in essence created an exception to the Federal Water Pollution Control Act (FWPCA) for the regulation of radioactive effluent discharges from nuclear power plants. Under the exception, NRC determines limitations on such discharges and incorporates such limitations in the conditions it imposes on its licensees.

Petitioners' argument fails to address (a) the scope of current EPA regulatory authority and its implications for NRC regulation of licensee discharges; and (b) the relationship between standards or limitations for radioactive materials in the general environment as promulgated by EPA, and discharge limitations imposed on nuclear power plant licensees by the NRC.

The central argument of this brief amicus curiae is: (1) that Reorganization Plan No. 3 of 1970, (5 U.S.C. App., p. 609 et seq.), transferred to EPA the authority to set standards for the protection of the general environment and the individuals therein from ionizing radiation; (2) that this EPA authority necessarily requires EPA to determine the limitations to be imposed on the sources of radioactive effluent discharge into the general environment; (3) that EPA determination of discharge limitations to be imposed on the sources of radio-

active effluent discharges is consistent with and supported by the provisions of the Federal Water Pollution Control Act Amendments of 1972, (33 U.S.C. (Supp. III) 1251 et seq.),for the case of nuclear facilities licensed by the NRC; and finally, (4) that this shift of regulatory authority is consistent with the doctrine of federal preemption as it has been enunciated for the regulation of radioactive effluent discharges from nuclear power facilities in Northern States Power Co. v. Minnesota, 447 F. 2d 1143, (C.A. 8), aff'd, 405 U.S. 1035.

Reorganization Plan No. 3 of 1970 (84 Stat. 2086 et seq., 5 U.S.C. App., pp. 609 et seq.) provides EPA with the sole authority to set general environmental standards and thereby the authority to determine discharge levels for the radioactive effluent from nuclear power plants; and the Federal Water Pollution Control Act

Amendments of 1972 (FWPCA) provide EPA with discharge limitation, permit and enforcement authority over point sources of pollutants. The FWPCA defines "pollutant" to include "... radioactive materials ... discharged into water" (Sec. 502 (6) 33 U.S.C. (Supp. III) 1362), without qualification. The FWPCA further prescribes that national "standards of performance", defined as standards "... for the control of the discharge of pollutants ..." shall be established by EPA for various point sources, and includes "steam electric power plants" (33 U.S.C. (Supp. III) 1316 (b)) in its list of point sources. The FWPCA is therefore consistent with the Reorganization Plan; and provides EPA with explicit procedures for setting discharge levels for radioactive effluents, for applying the discharge limitations to specific nuclear facilities through a permit program,

and for enforcing the permit conditions in keeping with a specific timetable for implementing discharge control technologies.

Since the FWPCA does not explicitly amend the Atomic Energy Act of 1954 and subsequent amendments, and since EPA must produce a federal regulatory program for the control of radioactive effluent discharges which reconciles the two acts, federal preemption is not an issue at this time. EPA's subsequent development of such regulatory program may or may not raise the federal preemption issue, as the FWPCA affords EPA several options for implementing a discharge control program applicable to radioactive materials, some of which options would not neccessarily raise a federal preemption issue nor obstruct the further development of nuclear power. Accordingly, we urge the Court to defer further consideration of federal preemption until an

appropriate case is presented, subsequent to the promulgation of such EPA regulatory program.

Finally, we argue that Respondents' position is consistent with the several environmental statutes that concentrate regulatory authority over both general environmental levels of pollutants and related discharge levels from sources of the pollutants in EPA; and that such concentration of authority in EPA is consistent with efficient administration, and with the continued development of nuclear power sources under the authority of the Atomic Energy Act of 1954 and the Energy Reorganization Act of 1974. 88 Stat. 1233-1254.

ARGUMENT

I. AUTHORITY TO SET STANDARDS FOR THE CONCENTRATION OF RADIOACTIVE MATERIALS IN THE GENERAL ENVIRONMENT WAS TRANSFERRED FROM THE AEC TO THE EPA IN 1970, AND THIS TRANSFER PROVIDES EPA WITH THE AUTHORITY TO DETERMINE EFFLUENT DISCHARGE LIMITATIONS FOR THE SOURCES OF RADIOACTIVE MATERIALS IN THE GENERAL ENVIRONMENT, WHICH SOURCES INCLUDE NRC LICENSEES.

Reorganization Plan No. 3 of 1970, (5 U.S.C. App., p. 609 et seq.), was promulgated to establish the Environmental Protection Agency, and to concentrate in this new agency various functions for protecting the environment which had been fragmented among other federal agencies. The Reorganization Plan provides, in part:

> "Sec. 2 (a) There are hereby transferred to the Administrator:
>
> ...
>
> (6) The functions of the AEC under the AEC Act of 1954, as amended, administered through its Division of Radiation Protection Standards, to the extent that such functions of the Commission consist of establishing generally applicable environmental standards for the protection of the general environment from radioactive material. As used herein, standards mean limits on radiation exposures or levels, or concentrations or quantities of radioactive material, in the general environment outside the boundaries of locations under the control of persons possessing or using radioactive material."
> (5 U.S.C. App., p. 610)

EPA has done little with this authority since 1970, and in 1973, it was advised by the Director of the Office of Management and Budget to confine its radiation regulation to the general environment. In a memorandum from the Director of the Office of Management and Budget, Roy L. Ash, to the EPA Administrator, Russell Train, dated December 7, 1973, the following directive was contained and accepted by EPA:

> "...this memorandum is to advise you that the decision is that the AEC should proceed with its plans for issuing uranium fuel cycle standards, taking into account the comments received from all sources, including EPA: that EPA should discontinue its preparations for issuing, now or in the future, any standards for types of facilities; and that EPA should continue, under its current authority, to have responsibility for setting standards for the total amount of radiation in the general environment from all facilities combined in the uranium fuel cycle, i.e. an ambient standard which would have to reflect AEC's findings as to the practicability of emission controls..." (attached to court of appeals brief of Arkansas et. al., pp. 35-36. Accord, 119 Cong. Rec. H11749-H11750) (daily ed. December 19, 1973)

EPA has followed this interpretation of its functions, and in 1975, proposed regulations for limiting the levels of radioactivity in the general environment, and for limiting human, non-occupational exposures. Environmental Protection Agency, "Proposed Standards: Radiation Protection for Nuclear Power Operations,"

40 Fed. Reg. 23420 (May 29, 1975) .

The NRC has, since 1970, continued to independently promulgate "guidances" for limiting such radioactive effluents from nuclear power facilities. Such discharge limitations were in "interim" form for four and one-half years, as AEC "Proposed" Appendix I. 36 Fed. Reg. 11113 (June 9, 1971). Final Appendix I has been proposed on May 5, 1975 by NRC. (40 Fed. Reg. 19439). Such guidances have essentially served as discharge control regulations on NRC licensees, and have been used to restrict radioactive discharges since 1970. The NRC has employed cost-benefit analysis and the "As Low As Is Readily Achievable" principle (previously, "As Low As Practicable") in determining the numerical discharge limitations contained in the guidances, but has not employed EPA general environmental standards as a framework for setting its dis-

charge limitations, since such standards have not been available, and are only now in proposed form. 40 Fed. Reg. 23420, (May 29, 1975).

There is a necessary relationship between discharge levels and general environmental levels. In order to achieve and maintain general environmental levels, including levels of human, non-occupational exposure, appropriate discharge levels for each source have to be established. Since general environmental features differ in different regions (e.g. coastal regions, high-altitude regions, etc.); since the number of operating sources of radioactive discharges in each region changes over time; and since monitoring of actual concentrations may indicate that prior theoretical calculations as to future concentrations were invalid; the discharge levels for each facility in a region have

to be determined before operation and then reviewed and altered on the basis of operating experience and monitoring, as necessary to ensure that the general environmental levels will be met and maintained.

Therefore, discharge levels for each facility operating in a region logically have to be established and continually reviewed in light of these other circumstances, to ensure that general environmental standards will be achieved and maintained. However, the NRC has promulgated only generic discharge limitations in Appendix I applicable to all licensees, irrespective of these other circumstances.

Since the legislative history on control responsibility for radioactive effluent discharges from nuclear power plants, as presented by the parties in this case, is inconclusive as to Congressional intent, the central issue before this Court is the appropriate allocation of authority between the two agencies, consistent

with the scope of authority provided by Congress.

It is clear that general environmental standards govern discharge standards under existing legislation for air pollution (42 U.S.C. 1857 c-5(a)(2)(E)1970) and water pollution (33 U.S.C. (Supp. III) 1311(b)(1)(c)1972) control. Therefore, EPA's primacy on radiation regulation matters is evident, although unsupported by its activities to date. This primacy can only be effectively realized through EPA regulation of discharges as well as of general environmental levels, the Respondent's position. Interagency agreement can, of course, be reached to ensure that NRC expertise is available for EPA use in determining discharge limitations on a facility-specific basis.

In determining the appropriate allocation of authority between the two agencies, the Court should be guided by consistent Congressional determination that authority for both discharge and general environmental (ambient) controls should be concentrated in EPA for pollution control purposes. Congress has provided for few exceptions to this single-agency approach to pollution control, and only by means of explicit and detailed provisions in its major pollution control enactments: e.g. (1) aircraft noise emission (discharge) control by the Federal Aviation Administration (49 U.S.C. 1431), general (ambient) noise level control by state and local authorities; (2) dredge spoil disposal by EPA and the Corps of Engineers in a cooperative regulatory program (33 U.S.C. (Supp. III) 1344).

II. EPA AUTHORITY TO DETERMINE EFFLUENT DISCHARGE LIMITATIONS FOR THE SOURCES OF RADIOACTIVE MATERIALS IN THE GENERAL ENVIRONMENT, INCLUDING NRC LICENSEES, IS CONSISTENT WITH THE FEDERAL WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, AND WITH THE FEDERAL PREEMPTION OF STATE REGULATION OF RADIOACTIVE EFFLUENT DISCHARGES FROM NUCLEAR POWER FACILITIES.

The Federal Water Pollution Control Act Amendments of 1972 (FWPCA) provide EPA with discharge limitation, permit and enforcement authority over point sources of pollutants. The FWPCA defines "pollutant" as including "... radioactive materials ...discharged into water," (Sec. 502(6), 33 U.S.C. (Supp. III) 1362) without qualification. The FWPCA further prescribes that national "standards of performance," defined as standards "...for the control of the discharge of pollutants..." (33 U.S.C. (Supp. III) 1316(a)(1)) shall be established by EPA for various point sources, and includes "steam electric powerplants" (33 U.S.C. (Supp. III) 1316(b)) in its list of point sources.

The provisions of the FWPCA most relevant to EPA determination and application of discharge limitations on the radioactive effluents of nuclear power plants include the following:

1. Water quality standards to be established by the states subject to EPA approval, (33 U.S.C. (Supp. III) 1313) and subject to the overall objectives of the act to have (a) water quality on a national scale sufficient to protect fish, shellfish, wildlife and recreation by 1983 (33 U.S.C. (Supp. III) 1251(a)(2)); and (b) water quality on a national scale undisturbed by polluting discharges from point-sources by 1985. 33 U.S.C (Supp. III) 1251(a)(1).

2. Effluent limitations for existing point sources (33 U.S.C. (Supp. III) 1311) (discharge standards) to be developed by EPA as necessary to achieve and maintain the relevant water quality standards and 1983 and 1985 goals, noted above. Implementation of such limitations is to be accomplished through the National Pollution Discharge Elimination System (NPDES), wherein

discharge permits must be secured by the polluter and enforced by EPA and the states. (33 U.S.C. (Supp. III) 1342). Further, the NPDES program and the conditions of the permits must be based on Congressionally-prescribed criteria: by 1977, employment of the "best practicable control technology" (BPT) for each of the industrial categories of dischargers; (33 U.S.C. (Supp. III) 1314(b)(1)(B)) by 1983, employment of the "best available control technology" (BAT). (33 U.S.C. 1314(b)(2)(B)). An industrial point source category, designated "steam electric power plants" has been established for purposes of implementing the NPDES program (33 U.S.C. (Supp. III) 1316(a), 10 CFR40) and covers nuclear power facilities.

3. New source performance standards (discharge standards for future point sources) to be established by EPA for nation-wide application, on the basis of the "best available demonstrated control technology" for designated industrial categories and dischargers. 33 U.S.C. (Supp. III) 1316(a) .

"Steam-electric power plants have been so designated. (33 U.S.C. (Supp. III) 1316(b)).

4. Toxic effluent standards for the discharge of "those pollutants which after discharge and upon contact with any organism, either directly from the environment or indirectly by ingestion through food chains, will cause death, disease, behavioral abnormalities, cancer, genetic mutations physiological malfunctions or physical deformities, in such organisms or their offspring." These are to be established by EPA for nation-wide application (33 U.S.C. (Supp. III) 1317).

Each of the foregoing is subject to prescribed time frames. Further, the FWPCA defines the term "pollutant" to include among other things, "radioactive materials." (33 U.S.C. (Supp. III) 1362(b)). The decision of the Circuit Court of Appeals in this case relates to EPA responsibility for setting discharge standards, and thereby calls for EPA to set both effluent standards for existing point sources (2 above) and new source performance standards (3 above); or alternatively toxic

effluent standards for radioactive materials which would be applied to both existing and new sources.

Radioactive materials of the types discharged in the effluent from power plants readily qualify as "pollutants" under FWPCA, and thereby qualify for discharge regulation by EPA under the various provisions outlined above.

Regulation on the basis of the toxic pollutants section of the FWPCA, for example, could be applied to all radioactive materials. The states would not be able to require higher discharge limitations on toxic, radioactive effluents in light of the finding of federal preemption over power plant radioactive effluent discharges in the Northern States v. Minnesota decision, despite the reallocation of authority to EPA for controlling discharges. The possibility of differing standards among the states with consequent disruption of the national development of nuclear power would thereby be avoided; although each state could eventually qualify for implement-

ation and enforcement of the federal standards, following arrangements with EPA under the FWPCA (33 U.S.C. (Supp. III) 1341); 42 U.S.C. 1857C-5) and the consent of the NRC under the provisions of the Atomic Energy Act. 42 U.S.C. 2021(b).

Other alternatives for EPA in regulating such discharges are provided by the FWPCA. For example, EPA can determine discharge limitations for existing sources in keeping with its findings on "best practicable" control technology (33 U.S.C. (Supp. III), 1314 (b) (1) (B)) for implementation by 1977 and "best available" control technology 33 U.S.C. (Supp. III) 1314(b)(2)(B) for implementation by 1983. EPA can also determine discharge limitations for new sources on the basis of "best available demonstrated control technology." 33 U.S.C. (Supp. III) 1316(a)(1). EPA could in such cases, employ the principle of "As Low As Is Readily Achievable" (10 CFR 50. 34a(a)) and the methods of cost-benefit analysis, used by the NRC, and arrive at discharge limitations similar to those provided in NRC's Appendix I. 40 Fed.

Reg. 19439, (May 5, 1975).

The foregoing analysis also indicates that discharge control by EPA would not necessarily interfere with the principle of federal preemption over the radioactive effluent discharges of nuclear power plants, as such principle has been articulated in the Northern States case. 447 F.2d 1143(C.A.8) aff'd, 405 U.S. 1035 . Discharge control authority would remain with a federal agency, and the issue of federal preemption is therefore not raised by this case. Subsequent to the formulation of EPA discharge limitations and the implementation of such limitations in an EPA program, the federal preemption issue may arise in a controversy, and can be appropriately dealt with at such time.

EPA authority to determine such discharge limitations on nuclear power plant sources is therefore consistent with, and made capable of effective implementation by, the several provisions of the FWPCA, and does not, at this time, raise issues of federal preemption.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

Michael S. Baram

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Attorney

September 1975

IN THE

Supreme Court of the United States

October Term, 1975
No. 74-1270

RUSSELL TRAIN, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Petitioners,

vs.

COLORADO PUBLIC INTEREST RESEARCH GROUP, INC., *et al.*,

Respondents.

Brief of 14 Named States as Amici Curiae in Support of Respondents

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Introduction

The Environmental Protection Agency has succinctly stated the nature of the radioactive water pollution problem presented in this case:

> ". . . A number of long-lived radionuclides are now discharged [into the nation's waters] from various fuel cycle operations which carry a potential for build-up of environmental levels and irreversible commitments for exposure of populations that may persist for tens, hundreds, or thousands of years. . . ." EPA, *Proposed Standards for Environmental Radiation Protection for Nuclear Power Operation*, 40 Fed. Reg. 23419, — (May 29, 1975).

The question very simply put is who has regulatory control over the discharge of radioactive pollutants into the nation's waters. Is it EPA, as the express language of the Federal Water Pollution Control Act (FWPCA) of 1972 provides? Or is it the Nuclear Regulatory Commission (NRC, formerly AEC) as contended by the petitioners? Amici curiae believe that the 10th Circuit Court of Appeals correctly decided this case by holding that EPA has such regulatory authority. *Colorado Public Interest Research Group, Inc. v. Train,* 507 F.2d 743 (10th Cir. 1974).

In 1946, the Atomic Energy Act presented the only conceivable statutory authority for the regulation of radioactive emissions into water. From the Act's inception there was a question as to the full extent of such authority. The beginning of the resolution of the problem was presented in 1970 with Reorganization Plans numbers 3 and 4 in connection with the enactment of national environmental legislation (42 U.S.C.A. §§ 4321 *et seq.*). These Reorganization Plans transferred several functions of the Atomic Energy Commission to the Environmental Protection Agency. In particular, the duty to establish "generally applicable environmental standards for the protection of the general environment from radioactive material" (Reorganization Plan No. 3 of 1970, 35 F.R. 15623, 84 Stat. 2086) and the responsibility "for establishing . . . emission limits for radioactivity . . ." (Reorganization Plan No. 4 of 1970, 35 F.R. 15627, 84 Stat. 2090) were transferred to the EPA. Under these plans the AEC retained "responsibil-

ity for the *implementation and enforcement* of radiation standards through its *licensing* authority." *Id.* (Emphasis added.)

According to Reorganization Plan No. 4, not only was the authority to set generally applicable standards to be transferred to the EPA, but also, the AEC's authority to set specific standards in accordance with such general standards was transferred.

> "The Atomic Energy Commission is now responsible for establishing environmental radiation standards and emission limits for radioactivity. Those standards have been based largely on broad guidelines recommended by the Federal Radiation Council. The Atomic Energy Commission's authority to set standards for the protection of the general environment from radioactive material would be transferred to the Environmental Protection Agency. The functions of the Federal Radiation Council would also be transferred. AEC would retain responsibility for the implementation and enforcement of radiation standards through its licensing authority." Reorganization Plan No. 4 of 1970, 35 F.R. 15627, 84 Stat. 2090.

Thereafter, some question lingered as to the dividing line between the establishment of standards by the EPA and the implementation by the AEC. The uncertainty was resolved by Congress in the FWPCA of 1972 through the express reaffirmation of the EPA's regulatory authority over radioactive pollutants discharged into the waters of the United States. 33 U.S.C.A. §§ 1251, 1362.

Statement of Interest of Amici Curiae

The relative roles to be played by the NRC and the EPA in regulating the discharge of liquid radioactive wastes is an important concern to amici curiae. Amici believe that the protection of the health and safety of the people of this nation requires a clean environment, including the goal of water free from radioactive pollution; amici believe that the EPA is the federal agency best able to determine proper effluent standards with a view toward this goal. EPA expertise in pollution matters and its lack of any responsibility to promote the nuclear industry best permit an objective examination of radioactive discharges under the FWPCA.

The health and safety of their citizens is a traditional concern of the states, and the hazards of radioactive materials have long been of particular concern. When private industrial utilization of nuclear energy was made possible by the Atomic Energy Act of 1954, however, the role in safety and health regulation that remained to the states was left unclear. An amendment to that Act in 1959 addressed the states' role, but uncertainties still remained. Finally, when the state of Minnesota attempted to apply radioactive effluent regulations to a federally licensed nuclear industry facility, the courts held that the 1959 Amendment had been intended to preclude such state radiation regulations, except pursuant to formal agreements with the Atomic Energy Commission (AEC) as authorized by that amendment. *Northern States Power Company v. State of Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd* without opinion (two Justices dissenting), 405 U.S. 1035 (1972).

Subsequent to the *Northern States Power* decision, Congress addressed the problem of water pollution by radioactive materials (as well as other types of water pollution) by enacting the Federal Water Pollution Control Act Amendments of 1972 (FWPCA). 33 U.S.C.A. § 1251, *et seq*. The FWPCA affords to the states a major role in imposing and enforcing environmental health and safety regulations concerning water pollutants with the approval of the Administrator of the Environmental Protection Agency. Thus, the inclusion of radioactive materials in the FWPCA's definition of "pollutant" has important ramifications for states wishing to participate in protecting their citizens and environment against radiation pollution. In other words, to the extent that radioactive materials are embraced within the FWPCA, the states may now participate in the regulation of radioactive materials discharged into their waters.

Summary of Argument

The Federal Water Pollution Control Act, as amended in 1972, was specifically enacted to protect the nation's waters from pollution of every kind. The Administrator of the EPA has the duty to carry out this Act and is encouraged to seek state cooperation in achieving this end. This single major purpose of the FWPCA serves as an assurance that environmental problems will receive priority consideration in water quality evaluation, as clearly intended by Congress.

The Atomic Energy Act, on the other hand, was enacted in order to stimulate the growth of the nuclear industry. The concern for public health and safety expressed in the Act is in reference to nuclear explosions, over-exposure of individuals to radioactive materials,

and problems of theft and sabotage. The Act is not specifically concerned with the long-term accumulation of noncritical amounts of radioactive emissions in the enviroment and the effects thereof.

Enacted to serve completely distinct functions, the two acts involve only a coincidental overlap in the regulation of radioactive effluents. Congressional will, as expressed in the 1972 amendments to the FWPCA, indicates a strong desire to clean our national waters. All previous legislative enactments must and can be interpreted so as to fulfill this desire.

The plain meaning of the word "pollutant" as used in the FWPCA was correctly interpreted by the 10th Circuit to include byproduct, source, and special nuclear materials. Congress' failure to specifically exclude these materials, in light of other specific exclusions in the Act, should preclude any other conclusion. Even more persuasive of congressional intent is the fact that the inclusiveness of the term "pollutant" is discussed numerous times in the legislative history of the FWPCA, yet no attempt was made to incorporate the exclusions proposed by petitioners. The legislative history of the Act is ambiguous and is not a reliable indicator of congressional intent. Thus, the clear wording of the Act and its impressive objective, mandate a finding that by-product, source, and special nuclear materials are to be regulated by the EPA under the FWPCA.

ARGUMENT

I

The 10th Circuit Correctly Interpreted the Plain Meaning of the Federal Water Pollution Control Act in Holding That the Act Governs Pollution From Byproduct, Source and Special Nuclear Materials

A. The Definition of Pollutant Is Clear and Unambiguous

Congress carefully defined the terms used in the FWPCA (33 U.S.C.A. §1362). As petitioners point out, a great deal of legislative history discusses the inclusiveness of the term "pollutant" as used in the Act. The term is precisely defined in 33 U.S.C.A. section 1362(b):

> "The term 'pollutant' means dredged soil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, *radioactive* materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. . . ." (Emphasis added.)

In fact, the definition is the most lengthy of all those contained in the Act. Had Congress intended to exclude byproduct, source, and special nuclear materials from the operation of the Act, this would have been the obvious place to do so. In light of the numerous discussions on this matter, it cannot be said that the failure to specifically exclude these materials is a result of congressional oversight. The plain meaning rule (*United States v. Oregon*, 366 U.S. 643, 81 S.Ct. 1278, 6 L.Ed.2d 575 (1961)) is particularly applicable in this case.

B. Legislative History Is Not a Reliable Indicator of Congressional Intent in This Case

Petitioners rely primarily upon certain excerpts from the legislaive history of the FWPCA in making the argument that byproduct, source, and special nuclear materials are not included in the Act's definition of "pollutant." Respondents cite other excerpts from the legislative history which lead to the opposite conclusion. In particular, the comments of Senator Muskie, one of the Act's authors, are convincing as to EPA authority over these debated materials (Committee Print, "A Legislative History of the Water Pollution Control Act Amendments of 1972 Together with a Section-by-Section Index," prepared by the Environmental Policy Division of the Congressional Research Service of the Library of Congress, 93d Cong., 1st Sess. (1973); 1 Leg. Hist. 161, 198):

". . . [T]he Senator is asking whether EPA, in its authority to set effluent limitations controls with respect to the subject matter which the Senator has raised, can set those limitations and whether the AEC has to accept them. The answer is yes.

". . . .

". . . We considered that this kind of authority should be in EPA and not in AEC, and in order to put the authority there, we put it in this act, and that is where it is.

". . . .

". . . The whole concept of EPA is that environmental considerations are to be determined in one place by an agency whose sole mission is protection of the environment. It did not occur to us

that AEC might be more conscientious in this respect than EPA, so we have given EPA the total authority on the assumption that the risk from AEC was not of the nature described by the Senator but, rather, the opposite, as history demonstrates."

This background provides ample reason for this Court to refuse to rely upon the legislative history for the determination of congressional intent behind this statute.[1]

II

The AEA and the FWPCA Were Enacted for Entirely Different Purposes

A. The Atomic Energy Act Was Enacted to Promote Growth of Nuclear Power for Peaceful Purposes

Throughout the Atomic Energy Act of 1946 (42 U.S.C.A. § 2011, *et seq.*) the intention to promote the growth of nuclear power is clearly dominant. Section 2012, the congressional findings, repeatedly refers to *production* and *utilization* of source, byproduct, and special nuclear materials and the *operation* of nuclear facilities. 42 U.S.C.A. § 2012(c)(d)(e). In its recognition that "[a]tomic energy is capable of application for peaceful as well as military purposes," Congress declared national policy to direct the "*development, use,* and *control* of atomic energy . . . so as to promote world peace, improve the general welfare, increase the standard of living, and strengthen free competition in private enterprise." 42 U.S.C.A. §2011(b). (Emphasis added.)

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[1] *See also California v. EPA*, 7 ERC 1667, 1671 (1975) *cert. granted;* and *Alabama v. Seeber*, 502 F.2d 1238, 1246 (5th Cir. 1974).

"It is the purpose of this chapter to effectuate the policies set forth above by providing for—

". . . .

"(c) a program for Government control of the *possession, use,* and *production* of atomic energy and special nuclear material. . . ." 42 U.S.C.A. § 2013. (Emphasis added.)

The government's desire to harness nuclear energy for peaceful purposes is further demonstrated by those sections of the Act which limit liability for nuclear accidents and authorize federal indemnification for the atomic energy industry. (42 U.S.C.A. §§ 2012(i), 2210.) The Act, as a whole, clearly was meant to foster nuclear growth, deeming the general welfare and nuclear energy to go hand in hand.

1. *The AEA Was Not Enacted to Regulate Pollution Caused by the Disposal of Nuclear Wastes*

Section 2021 of the Act, "Cooperation With States," sets forth a procedure whereby the Atomic Energy Commission (AEC) (now the Nuclear Regulatory Commission (NRC)) may enter into an agreement with any state providing for discontinuance of AEC (NRC) regulatory authority with respect to byproduct, source, and special nuclear materials. 42 U.S.C.A. § 2021(b) Subsection (b) states:

"(b) Except as provided in subsection (c) of this section, the Commission is authorized to enter into agreements with the Governor of any State providing for discontinuance of the regulatory authority of the Commission under subchapters V,

VI, and VII of this chapter, and section 2021 of this title, with respect to any one or more of the following materials within the State—

"(1) byproduct materials;

"(2) source materials;

"(3) special nuclear materials in quantities not sufficient to form a critical mass.

"During the duration of such an agreement it is recognized that the State shall have authority to regulate the materials covered by the agreement for the protection of the public health and safety from radiation hazards."

The AEA gives only passing concern to the problem of disposal of nuclear wastes. In only one section of this lengthy legislation is the issue of disposal mentioned. Subsection (c) states:

"(c) No agreement entered into pursuant to subsection (b) of this section shall provide for discontinuance of any authority and the Commission shall retain authority and responsibility with respect to regulation of—

"(1) the construction and operation of any production or utilization facility;

"(2) the export from or import into the United States of byproduct, source, or special nuclear material, or of any production or utilization facility;

"(3) the *disposal* into the ocean or sea of byproduct, source, or special nuclear waste materials as defined in regulations or orders of the Commission;

"(4) the *disposal* of such other byproduct, source, or special nuclear material as the Commission determines by regulation or order should, because of the hazards or potential hazards thereof, not be so disposed of without a license from the Commission." (Emphasis added.)

This passing reference to disposal of nuclear materials is interesting in that this is the sole reference to disposal in the entire Act, clearly indicating that this was not a major concern of Congress in enacting this legislation.

The Atomic Energy Act as amended in 1954, 1959, 1970, and by the Energy Reorganization Act of 1974 (P.L. 93-438), adds nothing further in regard to disposal of nuclear wastes. The Nuclear Regulatory Commission (NRC) has assumed the AEC's duties in regard to nuclear licensing, but the basic regulatory duties are unchanged.

2. *The Problems of Waste Disposal Recognized in the Atomic Energy Act Are Not the Same Problems Sought To Be Cured by the Federal Water Pollution Control Act*

Enacted shortly following the first uses of the atom bomb at Hiroshima and Nagasaki, the Atomic Energy Act of 1946 displays a recognition of the fearful magnitude of atomic power. Although those bombings taught the potential health hazards of using nuclear energy, their primary lesson was the massive destruction which could be wrought through the non-peaceful use of nuclear power. The safeguards of the Atomic Energy Act are directed at the possibilities of a major nuclear

catastrophe by theft, sabotage or mishap. Protection of public health from radiation hazards is discussed several times, but in a context which implies a connection to such a catastrophe as mentioned above. For example, public protection against "nuclear incidents" is one goal of the Atomic Energy Act. As defined by 42 U.S.C.A. section 2014(q), the term "nuclear incident" means:

". . . any occurrence, including an extraordinary nuclear occurrence [42 U.S.C.A. § 2014(j)] . . . causing . . . bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material. . . ."

From this definition it can be seen that the gradual accumulation of radioactive material in the environment over a period of several decades would most likely not be classified as a "nuclear incident." Yet, this slow deterioration of the environment caused by radioactive pollution over an extended period may seriously endanger human life. The Atomic Energy Act does not seem to be geared toward safeguarding against such a protracted process.

Serious criticism has been directed toward the AEC's role in protecting public health and safety:

"In other areas, such as food and drug regulation, for example, products may not be used until their safety has been adequately demonstrated; in the radiation area, however, the reverse is true, since the approach is to permit exposures to radiation until adverse effects have been demonstrat-

ed." *Federal Environmental Law* (ed. Dolgin and Guilbert), Environmental Law Institute, West (1974) at 1029.

On May 29, 1975, the EPA issued its Proposed Standards for Environmental Radiation Protection for Nuclear Power Operation, 40 F.R. 23419 [40 C.F.R. Part 190]. The narrow scope of protection of "public health and safety" previously afforded by the AEC is demonstrated by the comments accompanying the proposed standards.

> "Radiological protection of the public from nuclear power industry operations has been based to date on guidance which has had as its primary focus the general limitation of dose to the most exposed individual, rather than limitation of the total population dose from any specific type of activity. The proposed expanded development of the nuclear power industry requires, however, the use of a broader environmental perspective that more specifically considers the potential radiological impact on human population of radioactive effluents from the industry; rather than just that on the most exposed individual. A number of long-lived radionuclides are now discharged from various fuel cycle operations which carry a potential for build-up of environmental levels and irreversible commitments for exposure of populations that may persist for tens, hundreds, or thousands of years."
>
> ". . . .
>
> "Protection of the public from the environmental accumulation of long-lived radioactive materials may require some changes in regulatory requirements."

The Federal Water Pollution Control Act as amended in 1972 is specifically aimed at restoring and maintaining "the chemical, physical, and biological integrity of the Nation's waters. . . . (1) [I]t is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985; . . ." 33 U.S.C.A. § 1251. The FWPCA's purpose, environmental integrity of our navigable waters, is entirely different from that of the Atomic Energy Act. (See Argument II C. 1 for further discussion of the FWPCA.)

B. The Federal Water Pollution Control Act Impliedly Amended the Atomic Energy Act

Petitioners claim that

> "[p]rior to the decision below, the Atomic Energy Commission . . . exercised exclusive authority to regulate radioactive effluents released from NRC-licensed electrical power plants and from government research and production facilities operated by contractors for ERDA." (Brief for the Petitioners, No. 74-1270, p. 19.)

It is interesting to note that petitioners used the word "exercised" in regard to the Commission's alleged exclusive authority. Nowhere in the Atomic Energy Act is such exclusive authority expressly granted. Section 2021 of the Atomic Energy Act expresses a contrary position in setting out a plan for cooperation between the AEC and the states. As discussed *supra*, this section provides the authority for state regulation of certain effluents from byproduct, source, and special nuclear materials.

As also mentioned *supra*, the Atomic Energy Act, both in its original form and as amended, deals only minimally with disposal of noncritical amounts of nu-

clear waste. Petitioners' statement that source, byproduct, and special nuclear materials are ". . . already regulated *comprehensively* by the NRC *pursuant to the Atomic Energy Act*" is misleading. (Brief for the Petitioners 74-1270, p. 33.) (Emphasis added.) Any program currently imposed by the NRC for the licensing of radioactive effluents is of a voluntary nature; nothing in the Atomic Energy Act forces the NRC to regulate ordinary, noncritical emissions.[2] Regulation by the EPA under the FWPCA, on the other hand, is mandatory for any pollutant entering our nation's waters. 33 U.S.C.A. §§ 1251, 1252, 1342.

In *Scenic Hudson Preservation Conference v. Callaway*, 370 F.Supp. 162 (S.D.N.Y. 1973) it was claimed that the Federal Power Act granted exclusive jurisdiction to the Federal Power Commission in the licensing of hydroelectric plants. The court stated:

> ". . . Con Ed points to no Power Act provision that would require the FPC to satisfy literally or even substantially the demands of § 404. On the other hand, § 404 conditions discharge of dredged or fill materials on approval by two federal agencies, granted pursuant to specific guidelines designed to protect the environment. Their approval is mandatory under the 1972 Amendments [to the FWPCA], whereas FPC compliance with § 404 would be merely voluntary. To this extent, the Acts are inconsistent." 370 F.Supp. 170.

A parallel situation is presented by the facts before this court. Although the NRC may have taken upon itself the regulation of ordinary radioactive emissions for environmental protection, it is charged with no such duty.

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[2]As stated in Argument II, *infra*, the statutory language of the AEA refers to *possession*, *use*, and *control*, rather than discharge of materials after use.

One particular historical fact is pertinent in respect to the status of nuclear regulation at the time the amendments to the FWPCA were enacted. In 1972, the Atomic Energy Commission was the regulatory agency implementing the AEA. There was widespread concern for the Commission's failure to adequately regulate the same industry which it had a duty to develop, as evidenced by the comments accompanying the Energy Reorganization Act of 1974, P.L. 93-438, 88 Stat. 1233.

> "(C) The Congress finds that it is in the public interest that the licensing and related regulatory functions of the Atomic Energy Commission be separated from the performance of the other functions of the Commission. . . ." P.L. 93-438 Section 2.
>
> "The Energy Reorganization Act of 1974 . . . will consolidate the Federal Government's fragmented and uncoordinated energy research and development functions and, at the same time, *upgrade the regulation* of nuclear power.
>
> ". . . .
>
> "The reorganization established by this legislation has the additional purpose of separating the regulatory functions of the AEC from its developmental and promotional functions—a response to growing criticism that there is a basic conflict between the AEC's regulation of the nuclear power industry and its development and promotion of new technology for the industry.
>
> ". . . .
>
> "Unfortunately, the present Regulatory Division of the AEC, from which nearly all of the new Commission's personnel and functions are drawn, has been weak and undernourished in relation to

> the vast resources of the development side of the AEC." P.L. 93-438, Legislative History, Senate Report No. 93-980. (Emphasis added.)

This concern alone may have been sufficient reason for members of Congress to wish to place another agency in control of radioactive water pollution. Such a conclusion is no more conjecture than petitioners' interpretation of the legislative history of the FWPCA, and, in view of the Act's language, is far more consistent.

In addition to the congressional intent to amend the AEA, it should be noted that the Act itself recognized the possible need for future amendment. Specifically, section 2021, governing cooperation with states, provides:

> "(a) It is the purpose of this section—
>
> ". . . .
>
> "(6) to recognize that, as the States improve their capabilities to regulate effectively such materials, additional legislation may be desirable." 42 U.S.C.A § 2021.

The FWPCA provides for a gradual increase in state authority, under the guidance of the EPA Administrator, in regulating pollution into water. This form of state cooperation would appear to correspond with the plan set forth in the Atomic Energy Act. Thus, should this court determine that the AEC (and the NRC) did, at one time, have exclusive jurisdiction to regulate effluents of byproduct, source, and special nuclear materials, it is suggested that this court also find that the FWPCA, as a later expression of congressional will, has impliedly amended that provision. *Ely v. Velde*, 321 F.Supp. 1088 (E.D.Va. 1971).

C. The EPA Is the Federal Agency Most Qualified to Regulate Radioactive Effluents Into Our Nation's Waters

1. *The FWPCA Has as Its Sole Function the Elimination of Water Pollution*

During this decade both federal and local governments have responded to the awakening of environmental consciousness throughout our nation. The time has arrived when it is recognized that all future life is intrinsically tied to the maintenance of an ecological balance in the world in which we live. Navigable waters play a fundamental role in our ecosystem.

The Environmental Protection Agency was established for one purpose—to protect our nation's environment. (Reorganization Plan 3 of 1970, 35 F.R. 15623, 84 Stat. 2086, eff. Dec. 2, 1970. *See also* Reorganization Plan 4 of 1970, 35 F.R. 15627, 84 Stat. 2090, eff. Oct. 3, 1970; 42 U.S.C.A. § 433.) That agency has no interest in promoting or protecting a particular industry (*i.e.*, the nuclear power industry), and is able to establish and enforce regulations from an interdisciplinary base so as to insure the best possible protection of our environment. No other federal agency meets this qualification.

The Atomic Energy Act, as amended, has several purposes. The development of the nuclear industry remains the most important. Although the development and research functions have been separated from the regulatory function by the forming of The Energy Research and Development Administration (ERDA) and the NRC, the NRC still has an interest in the continued use of nuclear power, that being the subject of its regulatory authority. This interest of the NRC is well demonstrated by language in *Northern States*

Power Company v. State of Minnesota, supra, 447 F.2d 1143 (8th Cir. 1971) *aff'd* 405 U.S. 1035 (1972):

> "Thus, through direction of the licensing scheme for nuclear reactors, Congress vested the AEC with the authority to resolve the proper balance between desired industrial progress and adequate health and safety standards. . . . Were the states allowed to impose stricter standards on the level of radioactive waste releases discharged from nuclear power plants, they might conceivably be so overprotective in the area of health and safety as to unnecessarily stultify the industrial development and use of atomic energy for the production of electric power." 447 F.2d 1153, 1154.

Now that Congress, through the FWPCA, has expressed its unqualified intention to clean up the nation's water, new environmental considerations must be weighed by the agency setting pollution standards and that agency must be able to view objectively the needs for nuclear energy and a clean environment. Compromise of health and safety in favor of nuclear growth is not tolerable in light of Congress' expressed intention to ultimately achieve zero water pollution. 33 U.S.C.A. § 1251(a).

2. *The EPA Has the Required Expertise to Regulate All Radioactive Effluents*

Section 2021(h) of the Atomic Energy Act requires the Administrator of the EPA to develop expertise in radiation matters.

> "The Administrator shall advise the President with respect to radiation matters, directly or indirectly affecting health, including guidance for *all Federal agencies* in the formulation of radiation standards and in the establishment and execution of programs of cooperation with States. . . ." (Emphasis added).

Thus, by the terms of the AEA, the EPA Administrator is required to play a major role in setting radiation standards and to guide the NRC (a federal agency) in establishing the same.

This cooperation between the EPA and NRC is further mandated by terms of the FWPCA (*e.g.*, 33 U.S.C.A. §§ 1252, 1254, 1314, 1317, 1361). The Administrator of the EPA is required to consult with appropriate federal agencies in setting pollution standards, conducting research on pollution technology and in other related areas. In addition, the Administrator may seek the assistance of other agencies in carrying out the purposes of the Act. 33 U.S.C.A. § 1361(h).

Petitioners agree that close cooperation is required between the AEC (NRC) and the EPA (Brief for the Petitioners 74-1270, p. 53). The problem appears to be in setting the point at which the authority of the two agencies is divided. Amici curiae suggest that the division logically must be correlated to the purposes of the two Acts involved. Since the Atomic Energy Act deals primarily with the possession and *use* of radioactive materials, its regulation is logically in those areas. The Federal Water Pollution Control Act deals with pollution of waterways. In the context of this case, the concern is radioactive waste materials (effluents of byproduct, source, and special nuclear materials)—an aspect arising *after* the use of nuclear materials. The EPA is charged with regulating such effluents.

Amici curiae in support of petitioners claim that ". . . regulation of liquid nuclear wastes from nuclear power plants is inextricably intertwined with [NRC's] regulation of other radiological aspects of such plants." (Brief Amici Curiae 74-1270, p. 21.) While this statement may be true, it misses the crux of the issue. It is exactly that dependent relationship between the construction and operation of nuclear power plants and the emission of liquid nuclear wastes which leads to the conclusion that proper consideration to environmental protection can best be made by the EPA (see Argument II B). This is not to say that nuclear growth should or must cease; rather, strong regulatory control must be given to the environmental effects of this growth. Such objective control is best attained through an agency with expertise in the environmental field. The EPA, specifically formed to provide such expertise and expressly required by the AEA to acquire expertise in radiation matters, is the proper agency to determine allowable nuclear effluent levels consistent with public health and environmental quality.

D. Regulation of Nuclear Effluents by the EPA Will Not Result in Unnecessary Duplication or Inefficient Regulation

The authority over radioactive materials discharges that is given to the EPA by the FWPCA is not inconsistent with the continued authority of the NRC to enforce radioactive materials discharge restrictions through its licensing program. This can best be illustrated with respect to the transportation of nuclear materials. Under its power to impose conditions to protect health and safety in conjunction with NRC licenses, the Commission prescribes standards for the packaging and transportation of radioactive materials, including fuel for nuclear reactors. The transportation

of these same materials is regulated, in addition, with regard to the same radiation hazards, by other federal agencies under the Transportation of Explosives Act, 18 U.S.C. §§ 831-835 (rail and highway); under the Dangerous Cargo Act, 46 U.S.C. § 170 (water); and under the Federal Aviation Act, 49 U.S.C. §§ 1421, 1430, and 1472(h), as well as by the Postal Service. The NRC (and its predecessor, the AEC) has never denied the fact that, while NRC plays a significant role in nuclear materials transportation regulation with regard to radiation hazards, the preeminent regulatory power over such transportation with regard to such hazards is vested in these other federal agencies, primarily the Department of Transportation (DOT). A reactor operator cannot secure a license from the NRC without conforming to NRC's radiation hazard control requirements concerning nuclear fuel transportation; but DOT regulations designed to control those same hazards in nuclear fuel transportation must be complied with as well. NRC's own regulations acknowledge this multiplicity of control over radiation hazards in transportation. 10 C.F.R. § 71.1(b).

The transportation example serves to make the point not only that the Atomic Energy Act is not necessarily exclusive of concurrent regulation by other federal agencies, but also that the jurisdiction of those other agencies over matters which are at the same time within the scope of the NRC is to be ascertained by reference to other appropriate statutes and not by reference to the Atomic Energy Act. Moreover, the cases indicate that where those other applicable federal statutes countenance regulation by the states, state regulations as well as the regulations of one or more other federal agency may apply concurrently with NRC (AEC) requirements concerning radioactive materials transportation. *See*

Western Interstate Nuclear Board, Report of Committee on Transportation of Radioactive Materials (1974).

Such a scheme of overlapping jurisdiction does not necessarily result in needless duplication of regulatory effort; rather, it makes possible collaboration and cooperative application of expertise while insuring greater opportunity for safeguarding public safety. A provision of the FWPCA, 33 U.S.C.A. § 1251(f), states that

> "to the maximum extent possible the procedures utilized for implementing this chapter shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government."

This, however, is not a disavowal of overlapping or concurrent jurisdiction; rather, it is a directive that when agency jurisdictions do overlap the procedures worked out by the agencies should aim at efficiency. An example of agency cooperation in an area of concurrent jurisdiction is the Memorandum of Understanding dated March 22, 1973, 38 F. R. 8466, by which the AEC and DOT recognize the DOT's predominant authority over nuclear materials transportation but outline cooperative measures for meshing DOT action with concurrent controls of the AEC.

Another example of dual regulation specifically contemplated by the FWPCA concerns standards of performance for "steam electric powerplants." Steam electric powerplants in which the heat from nuclear reactions rather than the heat from fossil-fuel combustion is used to manufacture the steam, are of course licensed by the NRC under the Atomic Energy Act, and NRC demands certain performance standards as a condition

to such licensure. Yet the FWPCA specifically requires EPA nonetheless to impose "national standards of performance" upon "steam electric powerplants." Still another example of dual regulation specifically contemplated by the FWPCA (although not having to do with radioactive pollutants) occurs in 33 U.S.C. section 1342 (g) (Supp. 1973) providing for concurrent EPA and DOT regulation of pollutant discharges from vessels or other floating craft.

Plainly, therefore, there is nothing in the FWPCA to repel the conclusion that derives from the plain meaning of the words of the statute. Although the NRC may have power to limit radioactive materials discharges incident to its authority to regulate construction and operation of nuclear facilities, the FWPCA gives independent regulatory power over such discharges to the EPA. If there is a possibility of inefficiency in this congressionally chosen scheme, the solution is administrative accommodation, as for example by AEC enforcing through its licensing proceedings the more stringent regulations that other agencies having jurisdiction might impose. The solution is *not* to ignore the important responsibility conferred by Congress upon EPA for the public benefit.

E. The Northern States Case Does Not Preclude EPA Regulation of Byproduct, Source, and Special Nuclear Materials

The issue in controversy in *Northern States Power Company v. State of Minnesota, supra,* 447 F.2d 1143 (8th Cir. 1971), *aff'd* 405 U.S. 1035 (1972), was:

> ". . . whether the United States Government has the sole authority under the doctrine of pre-emption to regulate radioactive waste releases from nuclear power plants to the exclusion of the states." *Id.* at 1144.

As has been discussed by petitioners and by amici curiae in support of petitioners, the court found that the states were pre-empted from setting effluent emission standards.

Regardless of the correctness of the court's finding with regard to state regulation, the *Northern States* case does not hold that the EPA may not regulate radioactive water pollution. The decision refers to a need for uniform control and federal regulation; the EPA would provide both. Moreover, the Federal Water Pollution Control Act, being a later expression of legislative intent, must control over the AEA and the *Northern States* decision as to both EPA and state regulation of nuclear effluents. *Lietz v. Flemming*, 264 F.2d 311 (6th Cir. 1959); *Ely v. Velde, supra*, 321 F.Supp. 1088 (E.D. Va. 1971).

The FWPCA established a *federal* program to achieve a *national* goal (33 U.S.C.A. § 1251). Throughout the Act, procedures are created whereby the states may participate in this program, but such participation is conditioned upon the approval of and continued surveillance by the Administrator of the EPA. For example, section 1313 deals with state requirements for meeting water quality standards. All state programs must be approved by the Administrator, and if a state fails to submit a satisfactory program, the Administrator has authority to establish regulations for the state. Additionally, section 1361(f) provides for the detailing of EPA personnel to the states in order to help carry out the purposes of the Act; thus, any possible lack of state expertise in this area is resolved by federal assistance.

Conclusion.

The Atomic Energy Act and the Federal Water Pollution Control Act were enacted for different purposes. Regulation of *all* radioactive effluents into navigable waters is mandated by the FWPCA. The EPA, as the administrative agency of the FWPCA, must impose and enforce effluent standards in this area and coordinate state programs for the achievement of this goal. The Nuclear Regulatory Commission must cooperate with the EPA in this move to protect our environment. Simultaneously, the NRC will be achieving part of its statutory duty to protect public health and safety. Meanwhile, the NRC can focus upon its primary duty, that of regulating atomic materials throughout the period when they are *possessed, controlled,* and *used.*

Thus, the NRC regulates nuclear materials in their operational, or functional, periods. The EPA, under the FWPCA, regulates radioactive materials which are no longer being used, but rather, are being discharged into our national waterways. A clear holding by this court that EPA has regulatory authority over such nuclear effluents will afford the best possible protection to the national environment and public health and safety.

Respectfully submitted,

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